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In the Supreme Court of the United States

OCTOBER TERM, 1920.

MARINE RAILWAY AND COAL CO. (INC.), plaintiff in error, *v.* UNITED STATES OF AMERICA, DEFENDANT in error.	No. 326.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This case turns upon the location of the boundary between Virginia and the District of Columbia on the Potomac River.

The parcel for which this action of ejectment was brought is a fraction of a larger area made, in the course of a river and harbor improvement, upon the submerged soil of the Potomac River. This suit, which is in the nature of a test case, will be decisive as well in respect of other more extensive areas now being raised in pursuance of a comprehensive plan of river improvement.

All of this land is being raised upon the submerged soil of the Potomac riverward of the high-water line boundary established by the charter of Maryland.

The Government's view is that the river boundary between Virginia and the District runs, as provided in that charter, with the actual high-water line on the western bank of the river. The defendant's contention is that it runs in straight lines from headland to headland at low-water mark. The former boundary puts the whole of the reclaimed area in the District. The straight-line boundary, if drawn between the low-water marks on Jones Point and Point Lumley (Duke Street) *as the latter now exists as a result of filling*, would put all the reclaimed area in Virginia except a small corner near Jones Point. (Exhibit B.)

THE FACTS.

It is not denied that the area in dispute lies within the original boundary lines of the District and eastward of the line of mean high water on the right bank of the river as it existed at the date of the establishment of the District. (R. 4.)

Until the river and harbor improvement was made, the whole area remained submerged soil constituting the bed and foreshore of the river within the ebb and flow of the tide. (R. 5.)

The river and harbor act of June 25, 1910 (36 Stat. c. 382, p. 630), made an appropriation for "Improving Potomac River at Alexandria, Virginia, in accordance with the report submitted in House Document Numbered Twelve hundred and fifty-three." (R. 173–182.)

In the course of improving the river by deepening its channel in accordance with the project adopted by that act, the Secretary of War began on Sep-

tember 6, 1910, to build a riprap sea wall on the river bed along the edge of the channel and below mean low-water mark. It ran from a point near the foot of Franklin Street to Jones Point, thus extending across the indentation called Battery Cove. The purpose of the wall was to confine and protect the navigable channel by forming a revetment against the swells of boats, wave action, and freshets. (R. 6.) The material dredged in deepening the channel was deposited on the flat behind the wall and between it and mean high-water mark on the Virginia shore. This flat had an average depth at mean low water of 1½ feet. (R. 5; Ex. B.) There were no structures of any kind extending from the upland into this area. (R. 6.) The owners of the upland had notice of the proposed work and consented to it upon the understanding that all rights of the respective parties were reserved. (R. 151–152.)

The construction of the sea wall began on September 6, 1910. By December 17, 1910, it had been completed to the extent that ordinary access to navigation from the defendant's upland had been cut off from so much of the front thereof as lies southward from the north end of the wall. (R. 6.) The work of depositing material as it was dredged from the channel began on March 4, 1911, and was completed on December 29, 1912.

It is to be noted that (1) none of the land filled in extends above the actual mean high-water line as it existed on the date on which the work on the wall was begun. (2) The greater part of it on

the contrary lies *below and riverward of the actual mean low-water line* as it then existed. (3) A tiny strip lies between the high and low water lines of that date. (R. 6, Ex. B.)

Only if the boundary is drawn in a straight line from a point at least as far north as Point Lumley at Duke Street *as it now exists as the result of filling* (Rec. 6) can any considerable part of the area be thrown into Virginia.

A fence, inclosing the reclaimed area, constructed by the Government along and following the actual mean high-water line as it existed immediately prior to the beginning of the work, was destroyed by the company, claiming, as owner of the adjacent upland in Virginia, to own the filled land also. (R. pp. 6–7.) Possession having thus been taken of the *locus*, the United States brought this action of ejectment. (R. 1.)

PROCEEDINGS.

The defendant company first interposed a plea to the jurisdiction upon the ground that the land claimed was not within the District of Columbia. (R. 2.) The plea was found against it. (R. 109.) That issue is the subject matter of the first bill of exceptions. (R. 110–111.)

It then pleaded the general issue. (R. 111.) At the trial, the effort was to show that, granting the *locus* to be within the limits and jurisdiction of the District, the fee, nevertheless, belonged to the owner of the Virginia upland. This issue also was found for the Government. (R. 153.) It is the subject

matter of the second bill of exceptions. (R. 155–168.) [By some error this bill is inserted in the record twice. R. 183.]

Plaintiff had judgment for the whole of the land described in the declaration. (R. 154.) The company appealed to the Court of Appeals.

That court affirmed the judgment. (R. 203.) It rejected *in toto* the claim for a boundary running in straight lines across the ordinary indentations of the river shore. As between the natural high-water line and the natural low-water line, the court did not find it necessary to make a choice, for the tiny fraction of the area thereby affected was practically negligible and the defendant, claiming the whole, had not taken any separate defense in respect of it. (R. 203.) The company thereupon applied for a writ of error, which was allowed by the court below. (R. 209.)

STIPULATIONS.

In a case of this kind, the evidence must be largely of an historical character and almost exclusively documentary. Counsel for both parties felt that the court's labors would be shortened and facilitated by reducing the material to the form of stipulations, from which irrelevant and merely formal parts of documents might be omitted, and in which (although *not* constituting an agreed statement of facts) all matters *in pais* should be briefly stated according to what would be the effect of the witnesses' testimony. The result will be found in the stipulations of January 17, 1916 (R. 3–91); April 21, 1916 (R. 91–106); and November 22, 1916 (R. 106–109). The whole of

these are incorporated by reference in the bill of exceptions on the question of jurisdiction. (R. 110.)

A similar effort was made on the trial of the general issue. So much of the matter in the previous stipulations as was relevant on that issue was offered by reference. The numerous instruments relied on as constituting defendant's chain of title to the adjacent upland, and offered to show title to the reclaimed area, were abstracted and incorporated in a third stipulation filed on May 23, 1919. (R. 112–152.) The second bill of exceptions indicates each offer from this stipulation and the ruling thereon. (R. 156.)

MAPS AND PLATS.

With the stipulation of May 23, 1919, were offered some 16 maps, drawings, and blue prints. Their evidential significance can best be appreciated in immediate connection with the discussion of the particular points in controversy. A formal description of them seems unnecessary.

ARGUMENT.

The propositions on which the Goverment's title rests.

Our title to the land in dispute is but the necessary consequence of certain propositions already established by controlling adjudications. They may be restated thus:

I. In the District of Columbia the United States as successor, by cession from the State of Maryland, to the lord proprietary of Maryland has not only the dominion but the absolute property of the soil of the

Potomac River to the ordinary high-water mark on the southern or Virginia bank.

Morris v. *United States*, 174 U. S. 196, 227.
Cropley v. *Dist. of Col.*, 23 App. D. C. 232, 244, 245.
Evans v. *D. C.*, 31 App. D. C. 844.
Hess v. *Muir*, 65 Md. 586, 606.
West Md. R. v. *Baltimore*, 106 Md. 561, 573.
Lord Proprietary v. *Jennings*, 1 H. & McH. 92.
Smith and Purviance v. *State*, 2 H. & McH. 244.

Conversely, the company, as owner of land in Virginia bounded by the Potomac had no property whatever in the soil underneath the river. Its tenement terminated with the territorial boundary line on which it abutted.

II. In the District of Columbia the United States is complete territorial sovereign for every purpose of government, national and local, and there is no separation in the exercise of this sovereignty between local and national powers.

Kendall v. *United States*, 12 Pet. 524, 619.
Capital Traction Co. v. *Hof*. 174 U. S. 1, 5.

III. This single, plenary, and exclusive sovereignty of the United States in the District of Columbia embraces an absolute power over commerce not dependent upon the authority of the commerce clause of the Constitution and (if such be conceivable) more fundamental and complete than the interstate power conferred by that clause.

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Gibbons v. *Ogden*, 1 Wheat. 1, 97.

El Paso Ry., etc., v. *Guitierrez*, 215 U. S. 87, 95.

IV. In the exercise of its power over commerce, even when dependent upon the interstate-commerce clause, the Federal Government has the unrestricted right to do whatever, in its judgment, seems best for the protection and improvement of navigation.

Union Bridge Co. v. *United States*, 204 U. S. 388.

South Carolina v. *Georgia*, 93 U. S. 4, 11, 13.

V. It thus had the right, in the case of the Potomac, to adopt, as a proper means for the improvement of navigation, the deepening of the channel by building a sea wall along its edge, dredging out the bottom of the navigable part of the stream, and depositing the dredged material on the shoal behind the wall. All ownership of land along the river was held in necessary subordination to this right to improve its navigation and subject to the obligation to suffer the consequences of the improvement. Any damage that might thereby result to the riparian owner was but the incidental consequence of the exercise of a lawful governmental power for the public good.

Gibson v. *United States*, 166 U. S. 269, 276.

Scranton v. *Wheeler*, 179 U. S. 141, 164, 165.

United States v. *Chandler-Dunbar Co.*, 229 U. S. 53, 63, 73.

Greenleaf-Johnson L. Co. v. *Garrison*, 237 U. S. 251, 261.

Willink v. *United States*, 240 U. S. 572, 580.

VI. Being in this District the sole, complete, and indivisible political sovereign, the United States is necessarily the only guardian and conservator of the general public interest, public trust, or public purpose (whatever term may be preferred), for which it is vested with the absolute property of the beds and shores of this great public navigable river, and is consequently the sole judge of the uses which shall be made of the same.

Shively v. *Bowlby*, 152 U. S. 1, 52, 57–58.

Home, etc., v. *Commonwealth*, 202 Mass. 422, 429.

Sage v. *Mayor of New York*, 154 N. Y. 161.

Wooley v. *Campbell*, 37 N. J. L., 163, 165, 166.

Com. v. *Roxbury*, 9 Gray, 451, 483, 485.

VII. Such a submerged bed, thus owned in absolute property by the United States and raised above the ordinary water level in the course of a lawful public improvement, constitutes the *locus in quo*. It is, therefore, the property of the United States—

> "* * * because the soil under the water must needs be of the same propriety as it is when it is covered with water. If the soil of the sea, while it is covered with water, be the king's, it can not become the subject's because the water hath left it."

Hale, *De Jure Maris*, c. 6.

Shively v. *Bowlby*, 152 U. S. 1, 48.

Austin v. *Rutland R. R. Co.*, 45 Vt. 215, 244.

Hoboken v. *Penn. R. R.*, 124 U. S. 656, 690.

The ground of defendant's claim.

The conclusion in favor of the Government's title defendant sought to overturn by showing that, before the river improvement was begun, it, and not the United States, was the owner in fee of this part of the river bed. This it endeavored to do in two ways:

I. *First by showing that this portion of the river bed was not within the District of Columbia.* A plea to the jurisdiction was interposed. Manifestly this was the main part of defendant's case. For if the area in dispute lay within the limits of the District, the United States obviously owned it before reclamation as part of the river bed and must continue to own it after it had been raised, as an incident of the lawful improvement of the navigation.

All the historical and other material incorporated by defendant in the stipulations of January 17, 1916, April 21, 1916, and November 22, 1916, was accordingly offered for the purpose of showing that a new boundary line had been substituted for the original charter boundary along the high-water line on the westerly bank of the Potomac. By reason of the facts adduced, it was contended, so much of the river, and consequently of the soil under it, as lay inside of

straight lines drawn from headland to headland at low-water mark, had passed over into Virginia. Defendant mistakenly says (Br. Plf. in Er., p. 36) that the report and award of the Virginia-Maryland arbitrators (R. 59) and similar evidence was excluded on the trial of this issue. On the contrary, all of the matter put into the record by defendant up to that time was offered and admitted (R. 110). The court held that, notwithstanding the evidence, the District boundary, as matter of law, was still the high-water line (R. 111).

II. *Defendant's second effort was to show a title to the locus as soil in the District.* The general issue was pleaded. Conceding that the river bed to high-water mark was still part of the District, as it had been part of Maryland, defendant now said that Maryland, by means of the compact of 1785, had granted the Virginia owners of upland abutting on the river such rights of property in the soil below high-water mark as would, upon the same principle invoked by the Government, make them the owners of any land which might be raised upon such submerged soil. Here, as before, defendant's case was bottomed on the compact—but with a difference. It was now claimed to operate as a grant from the State of Maryland to the individual owners of land in Virginia, conferring upon them perpetual estates in Maryland soil, and not as a treaty establishing a new boundary line between the contracting States.

The answer to both contentions is to be found in a clear understanding of the meaning and effect of the

compact of 1785 in its character as an interstate compact or treaty. For this reason discussion of the questions raised on the jurisdiction issue will, in large measure, anticipate, and perhaps abridge, the discussion of the contentions urged on the general issue.

Part One.

THE QUESTION OF JURISDICTION.

Territorial boundary a question of law.

The issue raised by defendant's plea to the jurisdiction is whether the *locus in quo* lies within the District of Columbia. As there is no dispute as to the actual location of the land, the issue turns upon the question whether the boundary line is the actual high-water mark of the Potomac, or whether, as defendant claims, it is a series of lines drawn across indentations from headland to headland at low-water mark.

The matter to be decided, therefore, is a pure question of law. (*State* v. *Wagner*, 61 Me. 178, 184.) Defendant's plea was not a traverse of any fact.

The answer to the question, moreover, is conclusively deemed to be already within the knowledge of the court. For this court, sitting on appeal, will "take judicial notice of the territorial extent of the jurisdiction exercised by the Government whose laws" it administers. No evidence, therefore, is necessary to show what that boundary is; nor would the court's judicial knowledge of it be affected even by an admission to the contrary in the pleadings.

Jones v. *United States*, 137 U. S. 202, 214.
United States v. *Reynes*, 9 How. 127, 147, 148.
Kennett v. *Chambers*, 14 How. 38, 50–51.
Hoyt v. *Russell*, 117 U. S. 401, 404.
State v. *Wagner*, 61 Me. 178, 184.
Harrold et al. v. *Arrington*, 64 Tex. 233.
State v. *Dunwell*, 3 R. I. 127, 128.

While many sources of information on the subject are indicated in the record, it must, of course, be understood that this material was intended simply to refresh the judicial recollection and facilitate investigation of the charters, statutes, and public acts by which the boundary was established. (*State* v. *Wagner*, 61 Me. 178, 186.) All elements necessary to a decision, whether offered in evidence or not, will be taken notice of by this court, which must know, as matter of law, the territorial limits of its own jurisdiction.

The question no longer open.

For the purpose of this case, all controversy as to the territorial limits of the District of Columbia would seem to be foreclosed by political action consistent only with the view that the territory of the District extends over the entire river to the line of high water on the Virginia shore. (R. S. D. C. sec. 1.)

Alex. Canal Co. v. *District of Columbia*, 1 Mack (D. C.), 257.
Evans v. *United States*, 31 App. 544.
Jefferson v. *Dist. of Columbia*, 40 App. 381, 383.
Smoot v. *District of Columbia*, 23 App. 266–271.

Thus it is difficult to see how the question raised by the plea can be regarded as still open in an action brought in a court of this District. Whatever jurisdiction this court might have to pass upon the question in an original proceeding for the purpose between the United States and the State of Virginia (*United States* v. *Texas*, 143 U. S. 612), it must be regarded, we submit, as the settled public law of this District that its southern boundary is the high-water mark.

In the first section of the Revised Statutes of the United States relating to the District of Columbia (approved June 22, 1874) Congress has defined the District of Columbia to be "that portion of the territory of the United States ceded by the State of Maryland for the permanent seat of government of the United States, including the River Potomac in its course through the District and the islands therein." Defendant tries to argue that the word "course" has here a limited significance and does not include the whole river. But obviously the word has the same meaning it had in the Act of 1801 when (the District including both sides and the river being placed in both counties) the same description was used for the whole of the river. (R. 19.)

So long ago as 1881, in *Alexandria Canal Co.* v. *District of Columbia* (1 Mack. 257), the general term of the District Supreme Court held that the District authorities had power to make a tax assessment upon the structure of the Aqueduct Bridge up to the line of high water on the opposite shore.

In *Smoot* v. *District of Columbia* (23 App. D. C. 266), it was held with regard to the licensing of a

steam engineer on a dredge in the Potomac opposite Georgetown that the police power exercised in respect of the District of Columbia extends to the *entire* river as it runs through the District. Congress has legislated upon that basis; and the record shows that the municipal corporation, as the executive agency for the enforcement of the police power, has claimed and exercised, and now claims and exercises, jurisdiction to the high-water mark on the Virginia side. (R. 86–91.) In *Evans* v. *United States* (31 App. D. C. 544), Evans was charged with fishing with a dip net in the waters of the Potomac River within the District of Columbia, contrary to section 896 of the Code. Evans, standing on a rock above high-water mark on the Virginia shore, took fish by dipping his net into the water below high-water mark (p. 546). The issue of high or low water boundary line was thus directly presented for decision, for it is obvious that no one State has power to make it a crime to take fish in a place not within its own territorial limits. In a carefully considered opinion, in which the principal points here made by defendant were discussed and disposed of, the court of appeals sustained the conviction upon the express ground that the territory now embraced within the District is coextensive with that included in the cession from Maryland, which *unquestionably owned the soil to the high-water mark of the Potomac River* on the southern or Virginia shore. Congress has never relinquished the title or control thus acquired (p. 554). Actual authority has been regularly exercised in accordance with that view.

These facts, we submit, constitute, so far as suits pending here are concerned, a political determination of territorial limits which, of necessity, is binding upon the courts of the same jurisdiction.

> This exception assumes to bring in question the eastern boundary line of this State. Where that line is, *de jure*, is a political question, with which the courts of the State will not intermeddle. Sufficient for them is it that the State has always claimed jurisdiction up to and "along the easterly side or bank" of the Seekonk River, and exercised it in fact. The courts are bound to take cognizance of the boundaries in fact claimed by the State.
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> *State* v. *Dunwell*, 3 R. I. 127, 128.
> *State* v. *Wagner*, 61 Me. 178, 184.
> *Heirs of Cameron* v. *Texas*, 95 Tex. 545, 551.
> *Harrold* v. *Arrington*, 64 Tex. 233, 238.
> *King* v. *Am. Transport Co.*, 1 Flip. 1, 8.
> *Thorson et al.* v. *Peterson et al.*, 9 Fed. 517, 519.
> *Foster* v. *Neilson*, 2 Pet. 253, 307, 309.
> *United States* v. *Arredondo*, 6 Pet. 691, 711.
> *Garcia* v. *Lee*, 12 Pet. 511, 520.

No jurisdiction to entertain writ of error.

Jurisdiction of this writ of error must arise, if at all, under section 250 of the Judicial Code. Of the seventeen assignments of error (R. 205–8), but four can conceivably be relied on for the purpose. The fifth, eighth, and tenth assignments are supposed to bring the case within the sixth clause, the fourteenth within the first clause, of that section.

The fifth assignment is grounded upon the construction of section 1 of the "Revised Statutes of

the United States relating to the District of Columbia," approved June 22, 1874. The suggestion is that it makes a case "in which the construction of any law of the United States is drawn in question by the defendant." But those words in clause 6 of section 250, as construed by this court, embrace only laws of the United States of general operation and do not include laws local in their application to the District of Columbia.

American Sec. & T. Co. v. *Dist. of Col.*, 224 U. S. 491, 494.

McGowan v. *Parish*, 228 U. S. 312, 317.

Washington & Mt. Vernon Ry. v. *Downey*, 236 U. S. 190, 193.

The eighth and tenth assignments relate to the construction of the act of Congress approved March 3, 1879 (20 Stat. 481), giving the consent of Congress to the agreement and award between Virginia and Maryland respecting the boundary between those States. That act does not touch the Virginia-District of Columbia boundary, nor is it otherwise involved in this controversy. The argument defendant endeavors to deduce from that act is so manifestly unsound that it can not serve as the basis for this writ of error. (See *infra*, *Fifth Point*.)

The fourteenth assignment of error is in respect of the holding that the parcel of land is within the jurisdiction of the Supreme Court of the District of Columbia and not within the jurisdiction of the courts of Virginia.

The first clause of section 250, it is true, permits a review of "cases in which the jurisdiction of the trial

court is in issue." It would seem that the intent of that clause is not as wide as the words. Otherwise, a dispute whether the amount in controversy placed a case in the Municipal or in the Supreme Court of the District of Columbia would give an appeal to this court as of right. Cf. *Smithers* v. *Smith*, 204 U. S., 632, 641.

The exact scope of this provision as applied to courts of the District of Columbia is a perplexing question. In this regard, the words of section 250 are the same as those of section 238 authorizing direct appeals to this court from the District courts. *McGowan* v. *Parish*, 237 U. S., 285, 292. The underlying purpose of both sections would seem to be much the same, namely, to permit a review here of the trial court's jurisdiction as a Federal court. Section 61 of the District Code declares that the Supreme Court of the District of Columbia shall possess the same powers and exercise the same jurisdiction as the district courts of the United States. *Benson* v. *Henkel*, 198 U. S., 1, 14. But it is also a court of general common law and equity jurisdiction (*Hartranft* v. *Mullowny*, 247 U. S., 295, 299), and unless the words be given a restricted meaning, confining them to contentions "intrinsically and essentially Federal" (*Male* v. *Atchison, T. & S. F. Ry.*, 240 U. S., 97, 101), every plea to its jurisdiction, on whatever ground, must bring the case here. Moreover, section 250 (which, like sec. 238, is clearly modeled throughout upon the common prototype, sec. 5, act Mar. 3, 1891, c. 517), provides in terms

almost identical with those of section 238 that "when any such case is not otherwise reviewable in said supreme court, then the question of jurisdiction alone shall be certified to the said supreme court for decision." There is no such certificate in the record. Yet, if the writ is to be supported on the point made in the fourteenth assignment, the action on the jurisdiction plea is the only subject for review. And since that issue did not involve the jurisdiction of the court as a Federal court, but its fundamental power as a local court of general jurisdiction to entertain any action touching the *locus*, it would seem that this writ can not be supported at all.

The interesting questions raised by plaintiff in error (defendant below), though doubtless similar to those which might be raised in an original suit between the United States and Virginia, involve the effect of colonial patents, conveyances between private parties, statutes of local application and a compact between two sovereign States, and draw in question the effect, *but not the validity*, of an authority exercised by the Secretary of War. Not one of these questions, however, falls within any of the six classes of cases in which this court is required to review the judgments and decrees of the Court of Appeals of the District of Columbia.

It would seem to follow that this writ of error should be dismissed for want of jurisdiction.

If the question of boundary is to be regarded as open in this case, then we submit that a re-examination of the subject will demonstrate that the original charter boundary has never been altered.

FIRST POINT.

At the date of the cession of the District, Maryland unquestionably owned, and therefore the United States necessarily acquired, the soil to the high-water mark of the Potomac River on the south or Virginia shore.

This is the necessary consequence of propositions established by controlling adjudications.

1. The charter of the Province of Maryland, granted in 1632 to Lord Baltimore by Charles I, embraced the Potomac River and the soil under it and the islands therein to high-water mark on the southern or Virginia bank.

> *Morris* v. *United States*, 174 U. S. 196.
>
> *Alex. Canal Co.* v. *Dist. of Columbia*, 1 Mack. 257.

2. The title thus granted to Baltimore was not divested by any valid proceeding prior to the American Revolution. Nor was it affected by the subsequent grants to Lord Hopton and Lord Culpeper of territory in Virginia between the Potomac and Rappahannock Rivers, "together with the said rivers themselves, and all islands within the uttermost banks thereof." (*Morris* v. *United States*, 174 U. S. 196, 225.)

This was the central point presented in the *Morris* case by the claim of the Marshall heirs and explicitly decided.

Defendant seeks to detract from the controlling force of that decision by saying that the Marshall claim there rejected, was based upon the Culpeper

grant of 1688, whereas its claim here is not founded on that grant at all, but on a grant made to one Howsing in 1669, nineteen years before. (Br. P. in E. pp. 42, 44, 45, 53.) It is, therefore, urged that the present case is distinguishable both from the Morris case and from *Evans* v. *United States* (34 App. D. C. 544).

This argument involves a mistake of fact as well as a fallacy of inference, and utterly overlooks the *ratio decidendi* of both cases.

(i) The Culpeper grant there dealt with was not a new grant, but a grant by way of confirmation. (4 Hen. St. Va. c. xviii, pp. 514, 519.) The grant of the Northern Neck of Virginia (commonly known as the Culpeper grant and afterwards vested in Fairfax) was originally made to Hopton and others by Charles II "on the eighteenth day of September in the first year of his reign." (R. 80.) That is to say, September 18, 1649. It thus antedated the Howsing grant by 20 years. It had moreover been confirmed to the successors of the first patentees by Charles II "on the eighth day of May in the one and twentieth year of his reign"—that is to say, May 8, 1669, not 1670 as defendant erroneously says. This is also prior to the date of the Howsing grant. All the right, title, and interest of the patentees having vested in Culpeper, the grant was again confirmed by James II "on the seventh and twentieth day of September in the fourth year of his reign." (1688.)

It is plain that when this court held that the Maryland proprietary's title to the bed of the entire

river was not affected by "the subsequent grant to Lord Culpeper," it decided that his title was not affected by the grants of which the Culpeper patent was but a second confirmation. And these grants, though subsequent to the Maryland charter and inoperative against it, were both prior to the Howsing patent and cut it out. Not having been made by the governor and council before September 20, 13 Car. II (1661), the Howsing grant was not within the saving clause of the St. Alban's confirmation. (4 Hen. Stat. Va., p. 518.) Whatever force it has as a grant is due to its having been confirmed in 1748 by consent of Fairfax, the final holder of the Culpeper grant, upon condition of attornment to him. (R. 34.)

(ii) But defendant's argument simply confuses the point of the Morris decision. The point is that inasmuch as the Maryland charter of 1632 was never invalidated by any proceeding prior to the Revolution, "the territory and title thus granted to Lord Baltimore, his heirs and assigns" could not be affected by a *subsequent grant*, notwithstanding the latter purported in terms to convey the river. The governor's grant to Howsing of 6,000 acres within the Northern Neck, was a junior grant just as much as the three royal grants of 1649, 1669 and 1688 of the whole of the Northern Neck, culminating in the Fairfax confirmation, *They were all equally subsequent grants.*

In saying "that the boundaries of the Culpeper grant were unascertained" until a later date (Br. Pl. in E. p. 57) counsel fails to note that the reference

is only to the northern and western boundaries above tide water.

As for the colonial charters of 1606, 1609, 1611, and 1612 (R. 31–33), it is elementary historical knowledge that these charters were forfeited upon *quo warranto* on June 16, 1624. In truth, defendant's insistent characterization of the Howsing conveyance of 1669 as a "royal" grant is predicated solely on the fact that upon the forfeiture of these charters the King had resumed the government of Virginia.

3. It follows, as a necessary consequence, that, as against all persons claiming under the colony of Virginia or under Hopton, Culpeper, or Fairfax, the lord proprietary of Maryland had ownership, dominion and jurisdiction over the waters and soil of the Potomac River to high-water mark on the southern or Virginia shore.

4. By the Revolution all rights of sovereignty and of property, including the waters and soil of the Potomac, conferred upon Baltimore by the charter of June 20, 1632, devolved upon and became vested in the people of Maryland and the Government ordained by them. (*Morris* v. *United States*, 174 U. S. 196, 227.)

5. By the acts of cession the United States succeeded to all rights of property, dominion, and jurisdiction in and over the Potomac River and its shores, theretofore vested in the State of Maryland.

Morris v. *United States*, 174 U. S. 196, 234.
Dist. of Col. v. *Cropley*, 23 D. C. 232–245.

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Act of Maryland, 1788, c. 46; act of Congress, July 16, 1790, c. 28 (1 Stat. 130), and March 3, 1791, c. 17 (1 Stat. 214–215); act of Maryland, December 19, 1791, c. 45.

We are thus led inevitably to the conclusion that—

6. The property, dominion, and jurisdiction in and over the waters and soil of the Potomac thus acquired by the United States from Maryland had, therefore, precisely the same boundary as the property, dominion, and jurisdiction vested in Maryland upon the Revolution, namely, the high-water mark on the Virginia shore.

From this conclusion defendant seeks escape by five main avenues:

(1) By the Howsing grant.

(2) By the Compact of 1785.

(3) By the Maryland-Virginia arbitration agreement or award of 1878.

(4) By the Act of 1879, giving the consent of Congress to said agreement or award.

(5) By certain domestic statutes of Virginia, supposed to have extended Alexandria over part of the river.

(6) By sundry facts relied on as indicating a tacit substitution of a new and different boundary extending "from low-water mark at one headland to low-water mark at another."

SECOND POINT.

The Howsing grant was without effect upon the territorial boundary between the two provinces, and neither conveyed nor purported to convey any estate in the bed and soil of the Potomac River.

There is no evidence whatever to support the claim that the area in dispute "is within the lines of a grant . . . to Howsing." But it would not help defendant if it were.

For transporting 120 persons into the colony, Robert Howsing, on October 21, 1669, obtained from Sir William Berkeley, governor of Virginia, a patent for—

> Six thousand acres of land, scituate, lying and being upon the freshes of Potomack River on the west side thereof . . . beginning at a red oake standing by a small branch or a run of water neare opposite to a small island commonly called and known by the name of My Lord's Island extending down the Potomack River various courses 3152 po., makeing a S. Wtly. line to a pokecory standing at the north side of the creek . . . named Indian Cabin Creek . . . from the said pokecory NW. and by W. up the said creeke and main branch 520 po. from thence N. 1940 po. finally E. 720 po. to the red oake begun at, including sev'al small creekes or iniets for the said quantity. (R. 67.)

This grant is 37 years subsequent to the royal charter of June 20, 1632, by which the province of Maryland was permanently separated from Virginia.

> The said province, and the freeholders or inhabitants of the said colony or country, shall

> not henceforth be held or imputed a member or part of the colony of Virginia. (R. 12.)

That charter also defined the boundaries of the new Province and granted to Baltimore, his heirs and assigns, the entire tract including the rivers and waters to the farther bank of the Potomac. At the date of the Howsing patent, therefore, the dominion and property of all the soil of the Potomac River was already vested in the Maryland proprietary. (R. 162.)

II. A CONVEYANCE CONFINED TO LIMITS OF VIRGINIA.

Defendant's counsel insists on characterizing the Howsing grant as a royal grant—a grant from the Crown. If so, the more strictly must it be construed against the grantee. (*Hungerford's case*, 1 Leon. 301; *R.* v. *Capper*, 5 Price, 217.) In theory of law the title to all *ungranted* land in America was in the Crown. But the King had already granted the Potomac and the soil under it to the Maryland proprietary. It is obvious that this grant by Berkeley "under the seal of this colony" (R. 34) was but a grant in course made in his capacity as colonial governor by virtue of authority to grant land *within that colony* to any person who might, by complying with certain conditions, entitle himself to an allotment, "as due by importation of servants." (See 1 Hen. St. Va., p. 276, 444.) It was made under general law for the disposition of unappropriated lands, not for the disposition of soil under public tidal waters.

(*Home* v. *Richards*, 4 Call (Va.) 441, 446, 447; cf. *Mann* v. *Tacoma L. Co.*, 153 U. S. 273, 284.) It is not to be distinguished from other conveyances by which "many adventurers and planters had taken up great quantities of land." (R. 34.) Nor is it different from similar grants by the land office of the Maryland proprietary, the King's tenant and feudatory lord, as well as political head, of that Province. (*Penn* v. *Baltimore*, *Cas. temp.* Hardwicke, 332.) The patent, then, whether royal or not, is but a conveyance of a specified quantity of land in that colony. The governor of Virginia was manifestly without power by such a grant to enlarge the political boundaries of the colony as delimited by the prior Maryland charter. Nor could he convey to a private subject soil which the King's grant under his own seal had already vested in the Maryland proprietary. Since the Howsing patent could operate only in Virginia, it must be construed as having reference *to the territorial limits of that colony.*

III. DOES NOT EXTEND TO SOIL UNDER A PUBLIC RIVER.

It seems quite clear, moreover, that the terms of the Howsing patent would not under any circumstances carry any portion of the bed and soil of the Potomac River. The tract is described as "scituate, lying, and being upon the freshes of the Potomac River on the west side thereof," and its easterly boundary is expressed as "extending down the Potomac River various courses." According to the accepted meaning of such a description, the land

conveyed is bounded by and runs with the natural water line. (*Shively* v. *Bowlby*, 152 U. S. 1, 13; *People* v. *Page*, 39 App. Div. N. Y. 110, 114, 117; *Rogers* v. *Mabe*, 15 N. C. 180, 194.) A grant in these terms, though made by the King himself, would not pass the bed and soil of the river in front of the tract in defiance of the established rule of law that a grant of lands bordering on public, navigable river, within the ebb and flow of the tide, stops at the water's edge and does not include the soil under the water, wherein the King's proprietary title is held for the benefit of the public.

Defendant seems to find some opposition between this view and the familiar rule that, in the disposition of public lands, meander lines are generally run not as boundaries of the tract but to ascertain the quantity of the upland to be charged for. But how would that bring the Howsing grant out to straight lines in the river? The whole point of the rule is that the watercourse is the boundary and not the meander lines. "The waters themselves constitute the real boundary." (*Hardin* v. *Jordan*, 140 U. S. 371, 380.) That being the case, whether the soil under the waters passes with the upland is another and different question, to be answered according to the applicable local law. By the common law as applied in both Maryland and Virginia, the passing of the soil depends upon the character of the stream; that is to say, whether it is navigable or nonnavigable. If it be, as here, a tidal, navigable river, the grant stops at the water's edge. If nonnavigable, the

grant extends to the center thread of the stream. In either case the natural call, the stream, is the boundary. But in the second case the boundary runs in the middle instead of on the edge, not because the courses by which the stream was sought to be meandered might actually extend across some part of the water, but because of the nonpublic character of the stream.

We think with defendant that the "various courses" of the Howsing grant were run not as boundaries but as meanders. But that does not help defendant's straight line theory. Under the rule defendant invokes, the grant either stops at the water's edge as we say, or else it runs to the middle thread of the Potomac.

And it is the public nature of the river that determines whether it is the one or the other. Manifestly Howsing could not take the unpatentable bed of the river simply because imaginary straight lines corresponding to the courses might extend across some of the water.

The invocation of this rule, moreover, places defendant in a dilemma: (*a*) Either the "various courses" of the Howsing grant were run as, and constitute, the definite boundaries of the tract, or (*b*) they are mere meander lines and not boundaries at all. In the former case, the grant is limited by the courses and distances specified, the water course is not the boundary at all, and no one claiming under Howsing is a true riparian owner. (*Producers' Oil Co.* v. *Hanzen*, 238 U. S. 335, 336, 339; *Niles* v.

Cedar Point Club, 175 U. S. 300, 306.) In the latter case, the river itself is the boundary, and since it is a navigable river within the ebb and flow of the tide, the grant inevitably stops at the line of the stream. (*Hardin* v. *Jordan*, 140 U. S. 371, 380.)

Nor is this result affected by the words "including several small creeks or inlets for the said quantity," so much stressed by defendant. These words would not take in a part of the public river simply because there was an indentation in the shore line. Nor was their purpose such as defendant attributes to them. They mean only that the 6,000 acres Howsing was getting "as due by importation of" 120 persons had been measured *approximately* in lines "extending down the river various courses 3,152 poles" without making allowance for small areas of water in the form of creek and inlet, which courses like these might include because of the impracticability of following up all of the meanders of the bank. The statement that the water areas were included "*for the said quantity*" was inserted to forestall any future claim on Howsing's part to have the total acreage recomputed by leaving out the useless water on a more careful resurvey, in order to take in some contiguous vacancy to make up the full quantity to which his transportation had entitled him.

Applications for resurveys for that purpose were by no means infrequent in those days of grants in large blocks by rough and approximate surveys. A recital that the area of creeks and inlets was know-

ingly counted in to make up the quantity would foreclose such an application. The very fact that the creeks and inlets are described as *small* indicates also that they were interior streams and waters within the tract, and *not portions of the river in front of it.* The reference is to things like Four-Mile Run *in Virginia*, not to the Potomac River *in Maryland.* This adjective further emphasizes the intent that the inclusion of such small, and therefore relatively negligible, waters intersecting the tract should not thereafter be alleged as a diminution of the full 6,000 acres Howsing was entitled to.

The grant is not a grant of lands under tidal waters. There are no apt words for the purpose. How then can it be taken to convey the soil of the whole westerly stretch of the river inside a straight line from Alexander's Island to the north point of Hunting Creek? Yet that is what defendant says in order to lay a foundation for claiming the soil here in suit. (Br. Pl.-in-E., pp. 8, 50.) How can "various" courses "extending down" the river be converted into one straight line across the front of the tract?

The defendant argues that the Howsing grant must be taken to include the soil under Battery Cove, because the sketch maps of the grant (Ex. 9, Ex. 16) indicate that it took in Holmes (now Alexander's Island, Pases Island and Piper's Island. The fast land in these so-called islands is one thing. The submerged bed of the river is another. But it is

plain, moreover, not only from later detailed surveys, but from the sketch maps themselves, that these islands were substantially part of the Virginia mainland. They were separated from it, as Alexander's Island is to-day, only by narrow slashes or guts not constituting any part of the Potomac. All of the true islands such as Analostan Island, though lying nearer the Virginia than the Maryland shore, were recognized as within the province of Maryland and held by patents from the Maryland land office. (R. 12–13.)

For 150 years at least, the so-called Piper's Island (Jones Point) and the area marked Pases Island have been so united with the mainland that the circumstance that they could ever have been described as islands is something known only to antiquarians. In fact, both sketches of the Howsing grant show Piper's Island already joined by fast land of some kind to the Virginia shore. (Ex. 9, Ex. 16.) The topographical relation of these islands is not affected by counsel's boyhood recollection that Alexander's Island was reached by a bridge. It needs only an inspection of the Chart of the Head of Navigation of the Potomac River, compiled in 1838 from the surveys of Lieut. Col. Kearney, Maj. Turnbull, U. S. T. E., Wm. C. Fairfax, and M. C. Ewing (Exh. 6), to show that Pases Island was indistinguishable from the Virginia mainland, and that Alexander's Island was not and had never been separated from it by any such body of water as would warrant its being

treated as an island in the Potomac. It is evident from this chart, as well as from all other maps grounded on genuine surveys, that the water, which the rough sketches of the Howsing grant show between these so-called islands and the mainland, was no part of the stream of the Potomac, but a slash or gut largely fed by an interior creek or run. Note, too, that these bodies of land were not considered islands in 1801, when Congress made the County of Washington include "all that part of the district on the east side of the Potomac together *with the islands therein.*" (R. 19.)

The Howsing grant was unquestionably intended to carry the land "upon the freshes of Potomack on the west side thereof" from the run opposite My Lord's (Analostan) Island to the north side of Indian Cabin (Hunting) Creek. Alexander's, Pases and Piper's Islands were sufficiently identified with the Virginia mainland to be treated as being "on the west side of" the Potomac. The grant did not carry them because they were embraced within any cove or indentation. For such was not the case. It carried them because they were fast land "on the west side" of Potomac.

IV. SOIL NOT GRANTABLE FOR PRIVATE APPROPRIATION.

Should we concede that the Howsing patent is a grant from the Crown, it still remains true that the bed and soil of a public navigable tidal river, like the Potomac, would not pass by the words in which it

is expressed, for it is a fixed principle of the common law that—

> "general words in the King's grant never extend to a grant of things which belong to the King by virtue of his prerogative, for such ought to be expressly mentioned (2 Roll. 195 E)." (Comyn, Dig. Grant, G. 7; *Martin* v. *Waddell*, 16 Pet. 367, 411.)

It is fundamental that the King's ownership of the bed and shores of a public navigable river, within the ebb and flow of the tide, belongs to him by virtue of his prerogative, and is held by him in his public and legal character in trust for the nation and subject to public uses. It would take much more than inclusion to make up a stated quantity of fast land to divest the King's prerogative title to this part of the public domain. Not only is this true but an express grant of the bed of a public waterway to a private subject, *without the consent of the legislature*, would be void as inconsistent with the public uses to which the legal title itself is subject.

> *Martin* v. *Waddell*, 16 Pet. 367, 410.
> *R.* v. *Parmenter*, 10 Price, 378, 409.
> *Wooley* v. *Campbell*, 37 N. J. L. 163, 165.
> *Home* v. *Richards*, 4 Call (Va.) 441, 446, 447.

As said by this court, speaking of the great proprietaries of the American colonies, the crown title to the soil under navigable waters is held in trust for the common use of the whole community, "and not as private property to be parceled out and sold for his individual personal emolument." (*Morris* v. *United States*, 174 U. S. 196, 227.)

It would indeed be startling to discover that while the king's own patent, though containing apt words to convey soil under rivers, bays, and arms of the sea, did not vest the proprietaries of Maryland, Pennsylvania, and the Jerseys with private property in the soil under navigable waters, yet an ordinary grant by a colonial governor of Virginia could invest a common person with private property in the bed of a great highway like the Potomac by merely including several small creeks and inlets to make up the quantity of land stated in the grant.

V. MARYLAND PROPRIETARY NOT BOUND TO NOTICE DOMESTIC CONVEYANCES IN VIRGINIA.

Defendant's idea seems to be that failure on the part of the Maryland proprietary to notice and, in some way, to oppose the "royal grant" to Howsing, must imply acquiescence in an alteration of his charter boundary and a divesting of his dominion, property, and jurisdiction in the Potomac River.

Whether the Howsing grant be royal or otherwise, it was but a conveyance of land, such as "the king, as well as a common person, may make of lands vested in him at the time of the grant." (Comyn, Dig., Grant, G. 5.) Manifestly, this instrument was in no sense a grant of territorial jurisdiction or political powers or seigniorial franchises and privileges. It has nothing in common, therefore, with the charter of Maryland, whereby that Province was erected into a palatinate, and its grantee invested with *jura regalia* as exercised in the county palatine of Dur-

ham, that is to say, "as fully as the king himself, from whom all justice, honor, dignity, franchises, and privileges were at first derived. (4 Inst. 204, Dav. 60.)" Comyn, Dig., Franchise, D. 1. Howsing's grant of 50 acres a head for transporting 120 persons does not stand on a footing with any of those great instruments of which this court has said:

> The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, *including the property and the dominion of lands under tide waters.* (*Morris* v. *United States*, 174 U. S. 196, 226.)

Why, then, should the lord proprietary of Maryland be expected to notice Howsing's grant any more than numberless other local grants in Virginia? How, in fact, would he have become aware of it? Such a contention seems peculiarly extravagant when we remember that this court has held that the Maryland lord proprietary, though vested with title in express terms, was himself without power to make a sale or execute a patent granting the bed or shores of any tide water in his Province. (174 U. S. pp. 229, 238-239.) Why should he conceive that the governor of Virginia could do in Maryland what he could not do himself?

But if we are to assume the lord proprietary's attention being drawn to the matter at all, we find that he must have known also that subsequent to his own charter, the Crown had made a grant of *the*

whole of the Northern Neck of Virginia, by the Hopton patent of September 18, 1649 (1 Car. 2), confirmed to Hopton's successors, Henry, Earl of St. Albans, and others, on May 8, 1669. (21 Car. 2.) He would be aware, then, that the grant to Howsing was absolutely void even as a grant of land in Virginia. And so in fact it remained until 1748, when, by the consent of the successor of Hopton, these grants under the seal of the colony "within the limits and boundaries of the letters patent granted to the ancestors of said Lord Fairfax" were confirmed upon the condition that the same "be held, nevertheless, of the said Lord Fairfax." (R. 34.)

It is idle, therefore, to conceive the Maryland proprietary as bound to meddle with the Howsing grant. His business was with the proprietor of the Northern Neck. It was these two great patentees who stood over against each other. And, as this court has decided, although the grant of the Northern Neck was twice confirmed, and afterwards solemnly adjudged valid by the King in council, and embraced the Potomac River in terms, it did not in anywise affect the Maryland proprietary's dominion, property, and jurisdiction therein to the high-water line on the Virginia shore. (174 U. S., p. 225.)

It may be questioned whether in any event these patentees could alter the bounds of the provinces without the consent of the Crown. But surely the limit of reasonable suggestion is that the lord proprietary might have been bound to notice an actual and open occupation of defined bodies of land within

the boundary lines of Maryland. For such an actual occupation, if continued unopposed for a long period of time, might ultimately raise an implication of acquiescence in an altered boundary as to the land so occupied. But, in point of fact, there *never was any actual occupation under the Howsing patent, or otherwise under authority of Virginia, of that part of the bed of the Potomac River on which the land here in controversy was afterwards built up.*

Down to September 6, 1919, the whole of the area was—

> submerged land covered by the waters of the Potomac River within the natural ebb and flow of the tide, and within mean high-water line of the right or western bank of said river, and the soil within said area was submerged soil constituting a portion of the bed and soil of said river. (R. 5.)

Nor were there "structures of any kind extending from the defendant's upland beyond the mean high-water mark and within the area inclosed and reclaimed. (R. 6.) Throughout its history, until made use of in order to deepen the river channel, the area which defendant calls Battery Cove remained an open and obvious part of the public stream. The possession of the soil underlying the water necessarily followed the legal seisin. So long as it remained part of the bed of the river, it was not susceptible of possession adverse to the true owners, who, in the capacity of political sovereign, were successively seized of the bed and soil of this great public water-

way. It is, therefore, entirely inaccurate to say that defendant and its predecessors had possession of this land under "the grant to Howsing from the date of said grant in 1669 until 1912, when plaintiff undertook to oust the defendant."

VI. NO CONSTRUCTIVE POSSESSION OF THE RIVER UNDER THE HOWSING GRANT.

Here we may notice defendant's contention that, although the Howsing grant could not pass the river bed, possession of the upland might constitute a *constructive adverse possession* under color of title out to the supposed limits of the patent. The answers to this argument are many.

(i) In the first place, there is nothing to show that any one of the three "straight line" boundaries to which defendant resorts to take in this area corresponds with the calls of the Howsing grant.

The three lines suggested are: (1) A line drawn from Jones Point to Alexanders Island. (2) A line drawn from Jones Point to the northern extremity of Alexandria near Montgomery Street. (3) A line from Jones Point to Point Lumley (Duke Street). These lines all run in different directions, and they vary in distance as well as in course. The first is about 6 miles long and slices off the western part of the river. The second takes in a considerable section opposite the whole front of the city of Alexandria. The third is less than half a mile long and takes in a much smaller portion of the river.

Manifestly, all of these divergent lines can not correspond with the calls of the Howsing grant. Nor is there any evidence that any of them does so. Moreover, the Howsing grant did not run in any such straight line. It ran by "various courses," whose combined distance *aggregated* 3,152 poles, making down the river in a southwesterly direction. (R. 67.) Whether those courses were 5 or 25, no one can say. All we know is that to measure up 6,000 acres they included several small creeks and inlets. But there is nothing to show what creeks or inlets are required to make up that quantity, and besides Battery Cove is no inlet. Thus, there is absolutely no basis for inferring any identity, or indeed any relation whatever, between the Howsing grant and any one of these proposed boundary lines. And consequently no basis for inferring a "constructive" possession under that grant to any one of the lines.

(ii) But the doctrine itself has no possible application.

The theory of *constructive* adverse possession under color of title—a doctrine neither universal nor unqualified—has no application to land covered by water and incapable of possession in the ordinary sense. (*Hoye* v. *Swann*, 5 Md. 237, 249; *Casey* v. *Inloes*, 1 Gill (Md.), 497, 500.

Its utter inapplicability to such a case as this is demonstrated by many of its recognized qualifications.

(*a*) Being grounded on an inference arising from the common habits of men with respect to cultiva-

tion, the doctrine applies only when the land actually occupied and the land claimed are *both* of a kind put to the purposes of ordinary cultivation and use. (*Chandler* v. *Spear*, 22 Vt. 388, 404–406; *Paine* v. *Hutchins*, 49 Vt. 314, 318; *Bailey* v. *Carleton*, 12 N. H. 9.) Thus it is inapplicable to tracts which are *not* "of proper size to be *managed and used in a body* according to the customs and business of the locality." (*Thompson* v. *Barhans*, 61 N. Y. 52, 68, 69.) In such cases the notion of a constructive adverse possession is excluded because the occupancy of one tract is not of a nature to put the real owner upon notice that he has been ousted from the other, and that the right of entry, inherent in his legal title, is being barred. It can not operate as a disseizin. (*Bradtl* v. *Sharkey*, 58 Oreg. 153, 156, 158.) "It is a rule of evidence, not of property." (*Thompson* v. *Barhans*, 61 N. Y. 52, 68.)

(*b*) Again, if the true owner be at the same time in actual possession of part of the land, claiming title to the whole, *he* has the constructive possession of all the land *not in the actual* possession of the intruder under color only. And this is true although the owner's actual possession is not within the limits of the other's effective title.

> The reason is plain. Both parties can not be seized at the same time of the same land under different titles. The law, therefore, adjudges the seizin of all that is not in the actual occupancy of the adverse party to him who has the better title.
>
> (*Hunnicutt* v. *Peyton*, 102 U. S. 333, 368.)

Where the land is of a character not susceptible of ordinary occupation, and the true owner is a sovereign whose title is deemed in law to "draw the seizin or actual legal possession to it," there would be a technical difficulty in applying this qualifying rule whereby the constructive possession of the true owner offsets the constructive possession of the intruder. But without this sound qualification, constructive *adverse* possession would work manifest injustice.

(*c*) Constructive adverse possession is subject also to the qualification that if there be a total want of title in the grantor, as, for example, a legal inability to make any conveyance at all of the unoccupied land, then the partial possession of the grantee shall not be extended by legal fiction to include land which the grantor had no right to sell.

Proctor v. *Railroad*, 100 Me. 27, 29.
Roberts v. *Baumgarten*, 110 N. Y. 80, 83.

These considerations show that there is no room here for the application of a rule which is, after all, but a legal fiction. (*Carey* v. *Cagney*, 109 La. 77, 82.) For we have land of a totally different character, in law as well as in fact, from that actually occupied—land which is not only *publici juris* and incapable of private ownership, but which lies over the frontier in the territory of an independent sovereignty. As we have seen the soil of the Potomac River was patentable neither in Virginia (*Home* v. *Richards*, 4 Call (Va.), 441, 446, 447) nor in Maryland (*Morris* v. *U. S.*, 174 U. S. 229, 238, 239). The grantor had no

right to dispose of it. The sovereign of the river was not called upon to notice paper transfers of title in the opposite State. Actual possession of the upland only, even if known, would not put him upon notice that he was thereby being disseized of some indefinite area lying beneath the river and extending out to an unlocated line of which he had never heard.

If this be not true, then who can say how many private conveyances, of whose very existence we are now ignorant, may have been invisibly divesting whole stretches of the Potomac River out of Maryland and thus out of the United States? Prescription, as applied between sovereigns, must rest on a more solid basis of fact than that. Constructive adverse possession under color is but a fiction and is ineffectual against fact. (*Carey* v. *Cagney*, 109 La. 77, 82.)

(iii) *It is, moreover, a fiction of municipal law.* This purely American development proceeds upon the basis of local statutes of limitations, and is differently applied according to the particular theory of limitations which the statutes embodies. But the instant cause is not a case of adverse possession. Title by adverse possession, as such, is not a defense against the United States.

> *U. S.* v. *Nashville, etc., Rd.*, 118 U. S. 120, 122.
>
> *U. S.* v. *Insley*, 130 U. S. 263, 266.

All that can concern us, on the contrary, is the rule of prescription as applied between sovereign States. That is not the same thing as the municipal law of

adverse possession. It is a rule of *public law* that this court has held to be applicable between States of the Union. (*Louisiana* v. *Mississippi*, 200 U. S. 1, 53.) And, as the references and citations in the opinions show, it is derived rather from the civil than from the common law, through the adoption by this court of the principle "as established by the constant and approved practice of nations" and expounded in the continental writers on the law of nations.

This "principle of public law, universally recognized that long acquiescence in the *possession* of territory and in the *exercise* of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority," is not involved with any municipal rule of evidence or legal fiction incident to the technique of the law of real property. On the contrary, it is based upon a broad public policy. A sovereign who, for a great length of time, has acquiesced in the obvious possession of an opposing State, is deemed to have *no just right to ignore that manifest fact*, and, by asserting some ancient paper claim, to—

> imperil the tranquillity of the people, the safety of States, and the happiness of the human race. (*Virginia* v. *Tennessee*, 148 U. S. 510, 523.) Citing—
>
> Vattel, Law of Nations, Bk. II, c. 11, par. 149.
>
> Wheaton, International Law, Part II, ch. 4, sec. 164.
>
> *Indiana* v. *Kentucky*, 136 U. S. 479, 510.

In fine, it is grounded upon a consideration of the disastrous consequences which must flow from "any disturbance of long recognized boundary lines" in accordance with which men have lived their daily lives, which have determined their political allegiance and legal *status*, which have served as the orbit of actual *exercise* for the manifold powers of government, and which are bound up with "the attachments to country, to home, and to family, on which is based all that is dearest and most valuable in life."

Virginia v. *Tennessee*, 148 U. S. 510, 524.
Maryland v. *West Virginia*, 217 U. S. 1, 42, 43.

As we shall presently show, none of these things is true of the water area involved in this case.

Possession by a private party is relevant only as a physical basis for the exercise of dominion and sovereignty by the State. But a private possession which is merely constructive and fictional can not serve as a basis for the exercise of government. To inject the notion of a *constructive* possession by a private party into this principle of public law is simply to confuse and defeat it. They belong to different orders of ideas.

(iv) Defendant strangely enough cites *Lowndes* v. *Huntington* (153 U. S. 1), in connection with the contention respecting constructive possession.

That was not an interstate boundary case. It involved the right to oyster beds. The colonial grants in question were to the *town* of Huntington, which also had a patent from the State of New York.

Unlike the Howsing grant, they contained apt words for the conveyance of land under water. This court said that the *local* law appeared to be that grants in like terms made to other towns carried the soil of such bodies of water as the obviously inclosed bay there in question. But it rested its opinion on the proposition that, at any rate, the rights respecting *the use* of the bed for oyster cultivation had passed to the town.

> Either the title to these submerged lands passed by virtue of the colonial grants to the town of Huntington, or else it was in the State of New York, *Martin* v. *Waddell*, 16 Pet. 367; *Pollard* v. *Hagan*, 3 How. 212; *Shively* v. *Bowlby*, 152 U. S. 1, and this act, whose validity seems not to be questioned, cedes all the right, title, and interest of the State in these lands to the town, so far at least as is necessary for the purpose of oyster cultivation. (153 U. S. 1, 30.)

In their nature as well as in their language, the Dongan grants to various towns (among them New York) stand on a different footing from Berkeley's patent to Howsing. The history of these noted grants is too large a subject to be gone into here. But nothing has ever been decided concerning them contrary to our three propositions:

(1) That *express* words are essential to convey things held by prerogative title. (Supra, p. 28.)

(2) That *title to the soil* underlying a public navigable tidal river can not be conveyed to a private

individual without legislative authority to do that thing. (Supra, p. 34.)

(3) That a grant to a private individual of land bordering on a public navigable tidal river stops at the water's edge. (Supra, pp. 6, 28.)

See further, as to New York: *Roberts* v. *Baumgarten* (110 N. Y. 380, 383). The fresh-water stream cases, such as the Archer and Cress cases cited by defendant, manifestly have no application.

THIRD POINT.

Territorial ownership and dominion over the Potomac River to high-water mark was not affected by the compact of 1785.

The defendant says that the Maryland-Virginia compact of 1785 made a new interstate boundary on the Potomac. He is forced to admit, however, that it did not do so in terms. In 1908 the District Court of Appeals held that it had not had that effect. (*Evans* v. *District of Columbia*, 31 App. D. C., 544.) Inasmuch as the compact was a well-known historical document, which, moreover, had been the subject of consideration by the Maryland-Virginia arbitrators just a short while before, the same thing must be regarded as having been ruled by the general term of the District Supreme Court in 1881. (*Alex. Canal Co.* v. *Dist. of Colum.*, 1 Mack. (D. C.), 257.)

Before proceeding to an examination of the compact, it may be well to say a word respecting some of the historical matter in the record.

It is true that prior to the Revolution the people of Virginia did not formally acknowledge Lord Balti-

more's right to the whole of the Potomac River to high-water mark on the "further bank" any more than they acknowledged the legality of the grant which had carved the province of Maryland itself out of Virginia's original domain. But whatever the Virginia attitude might be, the validity of Baltimore's charter was beyond assault, and the decision of this court has definitively settled its construction as calling, beyond question, for the high-water mark on the Virginia shore. How Virginia may have affected to treat the soil of the river below high-water mark is of no consequence, unless Virginia's exercise of an opposing claim was acquiesced in by Maryland. Nor is the question here what Virginia and Maryland have agreed to be their boundary since the cession of the District, but what was the true boundary of this territory when the United States acquired it.

The charter gave the Maryland proprietary the entire river to the line of high water. Extracts from the archives (R. 12–13) show that, during the colonial period, Maryland consistently claimed by word and action her true charter limits. When Virginia, at the beginning of the Revolution, for the first time acknowledged Maryland's right to her own territory by declaring in her constitution that the territory contained within the charter of Maryland was thereby *ceded* to the people of that colony—

> with all the rights of property, jurisdiction, and government, and all other rights whatsoever which might at any time heretofore have been claimed by Virginia,

she attempted in the same instrument to except therefrom—

> * * * the free navigation and use of the Rivers *Potowmac* and *Pocomoke*, with the property of the *Virginia* shores or strands bordering on either of the said rivers, and all improvements which have been made or shall be made thereon. (Rec. 14.)

Maryland promptly repudiated the exception with which Virginia's superfluous concession was sought to be clogged by an unanimous resolution of her constitutional convention, declaring—

> (1) * * * that the State of Virginia hath not any right or title to any of the territory, bays, rivers, or waters, included in the charter granted by his majesty Charles the first, to Cæcilius Calvert, baron of Baltimore,

and

> (2) * * * that the sole and exclusive jurisdiction over the territory, bays, rivers, and waters, included in the said charter, belongs to this State; and that the river Patowmack and almost the whole of the river Pocomoke, being comprehended in the said charter, the sole and exclusive jurisdiction over the said river Patowmack, and also over such part of the river Pocomoke as is comprehended in the said charter, belongs to this State.
>
> Proc. Md. Conv., 1774–1776, pp. 291, 293 (R. 15.)

It is especially to be noted that this same resolution, which so emphatically reaffirmed the Mary-

land's charter title to and jurisdiction over the Potomac, also expressed the view—

> * * * that the river Patowmack, and that part of Chesapeake Bay which lies between the capes and the south boundary of this State, and so much thereof as is necessary to the navigation of the rivers Patowmack and Pocomoke, ought to be considered as a common highway, free for the people of both States. (R. 15.)

This clear treatment of the river in a double aspect, *first*, in respect of title and jurisdiction in one State, and, *secondly*, in respect of common use as a highway for the people of both States, is the key to the origin, purpose, and scope of the compact of 1785.

I. THE GENESIS AND PURPOSE OF THE COMPACT.

The Revolution period closed as it began with Maryland insisting upon her charter limits and repudiating with energy any claim on the part of Virginia to property in the beds, shores, or strands embraced within these limits, but willing to concede, upon principles of international law and comity, that the river might be used as a common highway, provided, of course, the Virginia portion of the Chesapeake, which separated Maryland from the sea, was similarly treated.

It must be remembered that the Constitution, with its comprehensive commerce clause, had not yet come into existence. The States were loosely held together by the Articles of Federation. It was of

deep concern to them that arrangements be made for the use of the great waterways connecting the seaboard with the interior, many of which ran through more than one State or divided State from State. In the absence of a central government having, through complete power over commerce, the right to control the navigation of such rivers, reasonable arrangements for their use by citizens of different States could only be made by direct agreements between the States themselves. The need for such an arrangement in respect of the Potomac was soon rendered acute by the movement for the development of internal navigation.

Under the leadership of Washington, attention had for some time been directed to the importance of the Potomac River as "a means [to use his own words] of becoming the channel of conveyance of the extensive and valuable trade of a rising empire." In 1784 he made a 680-mile tour of the western country and sketched a map of the region between the waters of the Potomac and those of the Youghiogheny, showing the advantages of the Potomac route. A letter to Gov. Harrison, suggesting a plan for the improvement of the Potomac, which, he said, "would mark your administration as an important era in the annals of this country" (Sparks, Writ. Washington, vol. 9, pp. 58–59; R. 108), was brought before the legislature and "public spirit in favor of the Potomac was soon awakened." He also secured the cooperation of Thomas Johnson, the first governor and one of

the leading men of Maryland. From a letter to Lafayette, written at Annapolis on December 23, 1784 (R. 108), we learn that Washington was then in Maryland, as one of several commissioners appointed by Virginia, "to fix matters with the assembly of this State respecting the extension of the inland navigation of the Potomac."[1]

The result of this conference was that the legislatures of both States, by similar acts, united in the incorporation of the Potomac Company,[2] which was organized in 1785, Washington being the first president, and Thomas Johnson, of Maryland, the second.

This scheme for opening up a route to the western country by way of the Potomac was unquestionably the occasion for the attempt by the Virginia and Maryland Legislatures to adjust all pending navigation questions by appointing commissioners for the purpose of forming a compact between the two States—

> * * * to regulate and settle the jurisdiction and navigation of Patowmack, Pocomoke Rivers, and that part of Chesapeake Bay which lieth within the territory of Virginia. 2 Kilty, Laws Md., 1785, c. 1 (R. 35).

Manifestly the term "jurisdiction" is here used "not in the broad sense of whole sovereign authority," but, according to a usage quite common in such

[1] Sparks, Writ. of Washington, vol. 9, p. 82. Report on the Survey of the Potomac, printed by order of the Senate, Wash., 1823, p. 51.

[2] *Washington's Interest in the Potomac Company*, H. B. Adams, p. 89. (J. H. U. Stud. Hist. & Polit. Sc., Ser. III.)

matters, in a restricted sense having reference only to the regulation and policing of waterways and the cognizance of cases arising thereon. (*Roberts* v. *Fullerton*, 117 Wis. 222, 224; 93 N. W. 1111, 1113.)

It does not include sovereignty or ownership of the river or its soil. (*Nicoulin* v. *O'Brien*, 248 U. S. 113, 114; *Nicoulin* v. *O'Brien*, 189 S. W. 724, 727.) Nor does it extend to any local or permanent object, but only to such as are of a "floatable nature." (*Wedding* v. *Meyler*, 192 U. S. 573, 584; *Mississippi & M. R. Co.* v. *Ward*, 2 Black, 485, 494; *Buck* v. *Ellenbolt*, 84 Iowa, 394; *Roberts* v. *Fullerton*, 117 Wis. 222, 226, 232.)

That the word has here no reference to territorial limits of sovereignty is proved to a demonstration by its use with regard to one body of water explicitly stated to be "within the territory of Virginia." As was said by the chancellor of New Jersey concerning the Pennsylvania-New Jersey compact of 1783—

> The requirements of the administration of justice and the necessity of providing for the protection of the navigation of the river gave rise to the compact. These, and these alone, were the objects of it. (*Atty. Gen.* v. *Del. & B. B. Rd. Co.*, 27 N. J. Eq. 1, 11.)

In 1908 the Court of Appeals said of the compact that it did not, by its terms, either express or implied, grant any title to the river or to the soil under it. (31 App. D. C., at p. 548.) The truth of this is brought out by the evidence in this record that no such purpose was entertained by the parties.

The meeting of the commissioners appointed by the two States proved to be an event of great historical importance, for it led to a concrete suggestion for the calling of a convention to remodel the organic law of the Union. In showing this relation to the formation of the Constitution, Chief Justice Marshall, in his "Life of Washington," clearly states the aim and purpose of the compact:

> While the advocates for union were exerting themselves to impress its necessity on the public mind, measures were taken in Virginia, which, though originating in different views, terminated in a proposition for a general convention to revise the state of the union.
>
> To form a compact relative to the navigation of the rivers Potomac and Pocomoke, and of part of the bay of Chesapeake, commissioners were appointed by the Legislatures of Virginia and Maryland, who assembled in Alexandria in March, 1785. While at Mount Vernon on a visit they agreed to propose to their respective governments the appointment of other commissioners with power to make conjoint arrangements, to which the assent of Congress was to be solicited, for maintaining a naval force in the Chesapeake; and to establish a tariff of duties on imports, to which the laws of both States should conform. When these propositions received the assent of the Legislature of Virginia an additional resolution was passed, directing that which respected the duties on imports to be communicated to all the States in the Union, who were invited to

send deputies to the meeting. (Marshall's "Life of Washington" (ed. 1850), vol. 2, p. 105.)

II. THE TERMS OF THE COMPACT.

The compact embraces twelve articles. (R. 35–39.) Most of them are summarized in *Wharton* v. *Wise* (153 U. S. 155, 163–165). The first five relate expressly to the navigation of the Pocomoke, the Potomac, and the Chesapeake. (R. 36.) Virginia disclaims all right to impose tolls or restraints on vessels bound through the capes of Chesapeake to or from Maryland and agrees that so much of the Chesapeake and Pocomoke as is "within the limits" of Virginia shall be a common highway. Maryland and Virginia reciprocally agree that vessels of the other may freely enter their respective rivers as a harbor, or for safety against an enemy, without payment of port duties. "Vessels of war" of either State shall not be subject to payment of port duties. Vessels not exceeding specific dimensions, trading from one State to the other, and provided with a permit from the naval officer of the district from which they depart, are relieved of port charges. All merchant vessels, other than the class just mentioned, which are to navigate the river Potomac are required to clear from some naval office in one or both States.

We pass now to the clauses concerning the Potomac.

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Article sixth declares that the Potomac—

> * * * shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland, and of the United States, and to all other persons in amity with the said States trading to or from Virginia or Maryland.

The remaining articles are but amplifications of this declaration.

The seventh article provides:

> Seventh, The citizens of each State, respectively, shall have full property in the shores of Patowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river, but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both States; provided, that such common right be not exercised by the citizens of the one State to the hinderance or disturbance of the fisheries on the shores of the other State, and that the citizens of neither State shall have a right to fish with nets or seans on the shores of the other.

The eighth article provides that all laws and regulations necessary for the preservation of fish or for the performance of quarantine in the Potomac or for preserving or keeping open the channel of the Potomac and the Pocomoke River within the limits

of Virginia shall be made with the mutual consent of both States. (*Ex parte* Marsh, 57 Fed. 719, 726; *Wharton* v. *Wise*, 153 U. S. 155, 175.)

By article nine lighthouses, beacons, etc., are to be erected and maintained on Chesapeake Bay between the sea and the mouths of the rivers Potomac and Pocomoke, and on the river Potomac, at the expense of both States in stated proportion, "and if this proportion [on the Chesapeake] shall in future times be found unequal, the same shall be corrected." A joint commission for the location of such lighthouses, etc., is provided for.

The tenth article deals with piracies, crimes, or offenses committed on that part of the **Chesapeake lying within the limits of Virginia,** or that part where the line of division from the south point of Potomac to Watkins Point, near the mouth of the Pocomoke, **may be doubtful,** as well as on that part of Pocomoke within Virginia, or where the line of division upon the said river **is doubtful.** (R. 37.)

When committed by persons not citizens of Virginia against Maryland citizens they are to be cognizable in the courts of Maryland. When committed by persons not citizens of Maryland against Virginia citizens, they are to be tried in the courts of Virginia. When committed by and against persons not citizens of either State, they are to be tried in the court of Virginia. When committed by a citizen of the one State against a citizen of the other, they shall be tried in the State of which the offender is a citizen.

The jurisdiction of each State over the Potomac shall be exercised in the same manner except that in the case of crimes committed by persons not citizens of either State upon persons not citizens of either State, the offenders shall be tried by the court of the State to which they shall first be brought.

If inhabitants of either State commit any injury upon the property of inhabitants of the other, adjacent to the bay or rivers, or to persons upon such lands, the court of the State where the offense shall have been committed shall make, upon notice to the offender, entry of his appearance, and proceed to trial and judgment in the same manner as if legal process had been served. Such judgment shall bind the person and property of the offender in *both* States.

Any vessel entering a port of the Potomac may be libeled by a process from the State in which such vessel entered, and if the *commercial regulations* of either State shall be violated by any person carrying on commerce in Potomac or Pocomoke Rivers, the vessel owned or commanded by the person so offending may be seized by process from the State whose laws are offended.

Any person flying from justice or attempting to defraud his creditors by attempting to remove his property, such person, or his property, may be taken on any part of the Chesapeake Bay, or the rivers, by process of the State from which such person may fly or property be removed.

Process from either State may be served on any part of the rivers upon any person, or property of any person, who is indebted to a citizen of that State except a citizen of the opposite State.

In all cases tried in pursuance of the jurisdiction settled by this compact, citizens of either State shall attend as witnesses in the other, upon process issued by the other but served by an officer of the county where the citizen resides.

The twelfth article provides that citizens of either State having lands in the other shall have liberty to transport to their own State the produce of such lands, or to remove their effects, free from all duties. Of course these jurisdictional provisions, so far as they were later covered by the Federal Constitution, were thereby superseded. (*Wharton* v. *Wise*, 153 U. S. 155, 167.) But they are illuminating as to the scope and purpose of the arrangement.

The thirteenth article provides for ratification by the legislatures of the two States. And each State enacts that the compact is never to be repealed or altered without the consent of the other.

III. THE EFFECT OF THE COMPACT.

1. *No intent to alter boundary.*—The terms of the compact make it quite plain that it was not the intention or purpose of the States to effect any settlement or alteration of their boundary. Although the compact does speak of the boundary on the Chesapeake and the Pocomoke as doubtful, no suggestion of adjustment is made with respect to that. **And**

nothing whatever is said respecting the boundary on the Potomac.

Had the intention been to establish a boundary different from that of the charter, nothing could have been more easy than to have said so. The importance of the subject is such as to forbid the supposition that the high contracting parties would have done that "in any other than express, precise, formal, and solemn terms." (*Ex. p. Marsh*, 57 Fed. 719, 729.)

The one object of all the provisions is to settle and determine matters of navigation and of judicial cognizance and process, *regardless* of the line between the territories of the two States. The various clauses but express corollaries and consequences of its fundamental provision that the waters mentioned shall be common highways for the citizens of both States, whether said waters lie within the limits of one or of the other. In short, the compact did not touch the question of boundary at all, but worked out with care a system for the concurrent use and police of the waters. It dealt with use and jurisdiction, not with sovereignty. (*Atty. Gen.* v. *Del. & B. B. Rd. Co.*, 27 N. J. Eq. 1, 21.)

2. *Shore and wharf rights without effect on boundary.*—It is argued that a change in the charter boundary of Maryland results, by implication, from the declaration of the seventh article that the citizens of each State should have full property in the shores of the Potomac adjoining their lands, with all emoluments and advantages thereunto belonging, and the privi-

lege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river. This provision is coupled with one making fishing in the river common to the citizens of both States, provided it be not exercised by the citizens of the one to the disturbance of the fisheries on the shores of the other, the citizens of neither State having a right to fish with nets on the shores of the other. All these provisions, it is to be noted, apply equally to both States. Yet it is said that the rights thus recognized in the citizens of Virginia necessarily push the charter boundary of Maryland back to low-water mark.

But it is readily seen that this argument proves too much, for, if the right in the shores is to be translated into terms of boundary and thus carry the line back to low-water mark, the right which the same clause recognizes in the wharves and other improvements must do the like. **The result is that the territorial boundary between the two sovereignties would be not a fixed but a fluctuating line dependent upon the caprice or interested activity of private individuals.**

The only escape from this manifest absurdity is to admit that the rights here recognized involve no change in territorial limits. They were not, and can not be, expressed in terms of boundary. The two things belong to different orders of ideas. The compact here, as throughout, was directed toward the regulation of a common use of the river as a highway and the reciprocal jurisdiction and privi-

leges rendered necessary by such common use. All of its provisions are but the expression of corollaries of the fundamental proposition of the agreement—equality in the rights of navigation.

Nor was there any incompatibility between complete equality of navigation and Maryland's continued sovereignty to her charter line. An illustration of this principle is afforded by settlement of the boundary between the United States and the Spanish possession of the Southwest. In the negotiation leading to the treaty of 1819 the Spanish minister had required that "the boundary between the two countries shall be the middle of the rivers and that the navigation of said rivers shall be common to both nations."

John Quincy Adams, then Secretary of State, agreed "that the navigation of the said rivers to the sea shall be common to both people." But, at the same time, he insisted, with respect to territorial limits—

> "that the United States have always intended that the *property* of the river should belong to them. He insists on this point, as an essential condition, as the means of avoiding all collision, and as *a principle adopted* henceforth by the Union in its treaties with its neighbors. * * * He considered this clause as indispensable and as eminently calculated to preserve a good understanding between the two people."
>
> Annals of Congress, 15th Cong., 2d sess. Appendix p. 2123.
>
> See also reference in *United States* v. *Texas*, 162 U. S. 1, 27.

This distinction has become a commonplace in the regulation and administration of rivers by international convention. Provisions are habitually made for navigation and police upon the principle of the use of the river in common for the purposes of commerce, quite irrespective of the location of the boundary line. (Kaeckenbeck, International Rivers [1918], pp. 15, 34, 74, 134, 184, *et passim*.)

3. *Compact not regarded as determining any question of boundary.* This is established by two facts:

First. That for 90 years thereafter, in connection with the settlement of the western boundary, efforts were made by both States to secure a settlement of the southern boundary. Action to this end was taken by Maryland in 1795, in 1801, in 1831, in 1833, in 1834, in 1872, and again in 1874. Observe this resolution passed 10 years after the compact:

> "*Resolved*, That William Pinkney, William Cooke, and Philip Barton Key, Esquires, be, and they are hereby, appointed commissioners on the part of this State to meet such commissioners as may be appointed for the same purpose by the Commonwealth of Virginia to settle and adjust, by mutual compact between the two governments, the western and southern limits of this State and the dividing lines and boundaries between this State and the said Commonwealth." Acts Maryland, sess. 1795. (R. 82.)

See also—

> Md. act of 1801 and Md. act of 1831.
>
> Resolution relating to the western and southern limits of this State, passed March 5, 1832; Laws, Md., 1831, Res. No. 128. (R. 107, par. b.)
>
> Laws, Md. 1833, Res. No. 80.
>
> Report and resolution in relation to the southern and western boundaries of this State. Laws, Md., 1834, Res. No. 99.

In this report it is explicitly said:

> The southern and western boundaries of Maryland have never been adjusted and defined by compact with Virginia. (R. 82.)

Nor was this understanding confined to Maryland. Virginia also treated the line as undetermined. When the Maryland commissioners, under the act of 1868, c. 370, met with the Virginia commissioners in Washington in February, 1872, no proceedings could be had, because, while the former were empowered only to settle the boundary line on the eastern shore of the Chesapeake, the Virginia commissioners were empowered to settle the entire boundary between the two States. See preamble of Maryland act of April 1, 1872. (R. 83–84, par. i.)

Second. That at the meeting of the joint commission of the two States in 1872, Virginia (in whose interest defendant says the compact of 1785 established the line at low water on the *southern or Virginia* shore) claimed that the true boundary was on the *north* or Maryland bank of the Potomac and

that the entire river was within Virginia by virtue of the Hopton grant. Such is the precise claim made at the close of the printed "Statement on the part of the commissioners of Virginia":

> "Virginia claims the River Potomac to the left or north bank on the western shore and to Scarbrough and Calvert line on the eastern shore of the Chesapeake from Point Lookout to the extremest part of the westernmost angle of Watkins Point, the promontory formed by the north headland of Little Annamessex River or Creek, on the eastern side of Tangier Sound, which headland or promontory is the initial and terminating point of survey between the two States of Maryland and Virginia, ascertained, agreed, and fixed as described, A. D. 1668, by and under their joint and several proper authorities, and by them approved and adopted." (R. 80, par. b.)

The same statement is reiterated in the report of the Virginia commissioners, December 18, 1872. (R. 79.)

Surely the assertion of such a claim shows that Virginia did not consider the compact as having determined the Potomac boundary. At that time, as always, both States recognized its binding force. Yet the claim put forward by the Virginia commissioners is directly contrary to the effect now suggested. Unless we impute to the representatives of a great Commonwealth the grossest bad faith, the claim to the *north* bank is clear proof that Virginia did not understand the compact to have the effect defendant

claims. We can not ascribe to Virginia a secret purpose to claim to the southern low-water line on the ground that the compact had fixed it there, and to ask for more under a title adverse to the compact and in opposition to its asserted significance and effect. Plainly, then, we must conclude that the compact had no such significance or effect.

4. *No reason for giving compact the effect suggested.*—The shore of a river to the line of ordinary high water is part of the river. The State that owns the river owns the shore. (*Alabama* v. *Georgia*, 23 How. 505, 514–515.) This is especially true of a tidal river, the shore of which is twice a day completely overflowed by the tide. When the tide is in, the entire shore lies under the water and is indistinguishable from the rest of the river bed. Only for a few moments at the turn of the ebb tide is the shore entirely exposed. At all other times either the whole or some portion of the shore is overflowed by the waters. The soil, for that very reason, has a special character. Shores are—

> * * * incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing.
>
> *Shively* v. *Bowlby*, 152 U. S. 1, 11.
>
> *Atty. Gen.* v. *Chambers*, 4 De G., M. & G., 206, 218.

Throughout all changes of tide, the high-water mark, which is the upper limit of this unappropri-

ated waste, remains clearly defined. It is a natural, visible sign marking the border line of the stream and separating it and its containing shore from the dry upland, or *terra firma*, which can be put to the ordinary uses of land.

Such is not the case with the low-water mark. Except for a few moments at the turn of the ebb, it is purely an imaginary line indistinguishable by any mark or sign. Taking such an invisible line for a boundary has the effect, for the greater part of the time, of dividing the waters of the stream into two parts, which, for any practical purpose, are indistinguishable one from the other.

What reason, then, can be assigned for abandoning the clearly defined charter boundary at the high-water mark for a line which, except for a few moments twice a day, has no existence and the only effect of which is to make it practically impossible to determine whether one is within one jurisdiction or the other?

The whole argument to the contrary goes upon the ground that the privileges in the shore accorded to Virginia are inconsistent with the retention of the charter boundary on the south side of the river to high-water mark. Such is not the case. There is no more difficulty in according rights in the shore of a Maryland-owned river than in according the right to extend a wharf into a Maryland-owned river. A right in the shore of a Maryland-owned river is no more than a right in the river itself. The shore and the river are one. A shore, overflowed at ordinary

tide, is not susceptible of use except as incident to the use of the stream. The title is held subject to the same public uses as the waters themselves. (*Shively* v. *Bowlby*, 152 U. S. 1, 11, 12.) A shore and a wharf extended from it subserve but one and the same use of the owner of the adjacent upland. The shore is a natural wharf and the wharf an artificial shore. The complete enjoyment of both shore and wharf is consistent with title in another below high-water mark. Such, in fact, is the situation of riparian owners under the law of most of our States.

But a low-water boundary, on the other hand, is inconsistent with that title and dominion in the entire river which in this case belonged to Maryland. It is because of this inconsistency that international law has recognized the principle that where, as here, the ownership of the river is not divided between the bordering States by the thread of the stream but belongs to one of them alone, such ownership carries the opposite bank as an accessory thereto.

> * * * Upon whatever grounds property in the entirety of a stream or lake is established, it would seem in all cases to carry with it a right to the opposite bank as accessory to the use of the stream, and perhaps it even gives a right to a sufficient margin for defensive or revenue purposes, when the title is derived from occupation, or from a treaty of which the object is to mark out a political frontier.

Hall, Int. Law (5th ed.), p. 123 (7th ed.), p. 125; 1 Moore, Int. L. Dig., p. 617.

Taylor (H.), Int. Pub. Law, sec. 241.

Twiss (Sir T.), Int. Law (Peace), sec. 141.

Grotius, *De Jur. Bell. et Pac.*, Lib. ii, c. 3, sec. 17, sec. 18; c. 8, sec. 9 (par. 2).

cf. The Twee Gebroeders, 3 Rob. (Admir.) 336, 339.

Without this ownership of the opposite shore, *at least so far as the water commonly and habitually extends*, the sovereign of the whole stream can neither enjoy the benefits nor perform the obligations incident to his ownership of the river as an entirety. Without it he is not truly sovereign of his own river.

> *Ripa ea putatur esse quæ* PLENISSIMUM *flumen continet.* Dig. 43, 12, 3, § 1.

Concession by the owner of the stream of a privilege in the waters and adjacent shore is no more inconsistent with title to the full extent of the stream under international than under municipal law. Rights thus ceded by the owner are taken to be ceded without prejudice to the other rights which belong to him. (Vattel, Bk. I, ch. 22, sec. 273.) Therefore the cession of a right of user, for whatsoever purpose, can not be deemed a surrender either of the basic right of property or of territorial sovereignty. (Rivier, Droit des Gens, t. I, p. 296.) It is an easement, not a title. The owner remains the owner.

If, then, we construe the compact, as it should be construed, as essentially a treaty between two sovereign States dealing with the use of a river upon principles of public law (*Howard* v. *Ingersoll*, 13 How. 381, 412), the privileges in the waters and adjacent shore accorded to Virginia amount to no more than the recognition of a servitude in the stream which (in international relations) is generally allowed in favor of the citizens or subjects of the opposite sovereign. The rights allowed in the appurtenant shore are but an incident of the rights allowed in the stream. This provision, therefore, was but a further means of carrying out the dominant idea of the compact, namely, that the river should be a common highway for both States. Such uses as the shore can be put to for the lading or unlading of goods, the construction of wharves, or the extension of the latter into the stream, like commercial navigation in general, are but forms of that "innocent use of territorial waters" which one sovereign accords by convention or customary law to citizens of neighboring States. (*The Apollon*, 9 Wheat., 362, 369; Wheaton, Int. L., sec. 193, 194.) The concession of such privileges or servitudes does not negative the retention of territorial sovereignty and ownership. Nor does it work an alteration of boundary.

Hall (5th Ed.), pp. 139–140, 159–160.
Wheaton, Elem., pt. ii, ch. iv, sec. 11.

Such State servitudes, moreover (as we shall presently see), necessarily came to an end when,

first, by force of the Constitution, and secondly, by force of the acts of cession, the United States became not only the government possessing power over commerce and navigation, but, within the original lines of the District, the single and indivisible sovereign of the whole river and both its shores, having the sole right to determine what, and in what manner, use should be made of the same:

More v. *Steinbach*, 127 U. S. 70, 81.

Shoemaker v. *United States*, 147 U. S. 282, 307.

Morris v. *United States*, 174 U. S. 196, 241.

Since, therefore, the river was throughout the dominant and controlling factor, and its use in common the object and purpose of the agreement, the compact readily harmonized the interests of both parties by leaving untouched the charter high-water boundary which is the essential mark of Maryland's undoubted ownership and dominion of the entire river and conceding Virginia, at the same time, full property in the shore and full right to wharf out therefrom as an incident of, and means facilitating, the agreed use of the waterway in common. To the framers of the compact the right to the shore was an incident of the right in the river. It was, to borrow Wheaton's words, "a means to the attainment of the end for which the use navigation of the water is permitted."

Wheaton, sec. 194; Halleck, ch. vi, sec. 27; Westlake (Ed. 1904), Pt. I, p. 159; Taylor (H.), sec. 240.

It may be suggested, perhaps, that the view just expressed is opposed to the use of the terms "full property in the shores." But what does "property" here mean? Inasmuch as the compact was made by the States in their sovereign capacities, subject at any time to be modified or abrogated by their joint will (*Georgetown* v. *Alex. Canal Co.*, 12 Pet. 91, 96), benefits thereby resulting to individuals were purely incidental and secondary. (Oppenheim, Int. Law, I., sec. 204, sec. 520.) They could exist only so long as the high contracting parties wished. "Full property in the shore," therefore, meant only such "property" as could be enjoyed while the States chose to keep the compact in force. Hence, it could not mean property in the sense of a vested estate, as in one's own land, which could not be taken away by such joint action of the States. It had nothing in common with seisin. What was meant was obviously a full enjoyment of all the uses of the shores so long as the compact remained in force—a right of user and enjoyment quite distinct from ownership, a *jus in re aliena*, an easement or servitude within the territorial limits of Maryland's river, created by and resting solely upon the compact. (Hall, Int. L. (5th ed.) p. 160.) It was, therefore, wholly without effect upon the charter boundary.

Nothing contrary to our view was decided in *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.* (109 U. S. 672). That case was not an adjudication upon the construction or effect of the compact of 1785. Nor did it involve any controversy between

the sovereign of the river and private individuals. The existence of a wharfing right was not disputed, for both parties claimed it—the plaintiff as appurtenant to a lot fronting on Water Street and separated by it from the wharf, the defendant under a license from the public as owner of Water Street.

The point decided (afterwards reaffirmed in *Morris* v. *United States*) was that the city of Washington is properly bounded by an exterior Water Street, and that such street, being the front estate, possesses all riparian rights whatever they might be. Thus the case is not an authority upon the nonlitigated question as to the precise nature and extent of riparian rights. Nor is it an authority upon the question whether or not riparian rights are held in complete subordination to the right and power to improve navigation. (*Greenleaf-Johnson L. Co.* v. *Garrison*, 237 U. S. 251). Much less is it an authority on the effect of the compact of 1785. What was said about the compact was by way of argumentative good measure. Plaintiff, the court said, must fail on any possible view; for if one conceded that the wharfing privileges of the compact implied an ownership in the soil of the shore, then the disputed wharf, being land, could not pass as an appurtenance to plaintiff's lot—and that was the only way in which plaintiff claimed it (p. 685).

It is contrary to every rule of logic and law governing the use of precedent to endeavor to turn this concession *arguendo* into a decision upon the compact. Note, moreover, that the implication is

that the rights under the compact are in the nature of a franchise, whereas defendant's whole case rests upon their constituting seisin of the subjacent land. It is not proper, however, to treat this case as an authority either way, for none of the important questions now before the court as to the intent and purpose of the compact, the effect of the cession, and the rights of the United States was then at issue.

Defendant argues that, if we are right, Maryland, after the compact, could have prevented Virginia from regulating the shipping within the harbor, and indeed could have made Alexandria an inland town by building a sea wall across its front. But the compact took care of that. It declared the river a "common highway" and provided:

> Eighth. All laws and regulations which may be necessary . . . for the performance of quarantine in the river Patowmack, or for preserving and keeping open the channel and navigation thereof . . . by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both States. (R. 37.)

There was, at that time, no unified central power over commerce. It was for that very reason that they made the compact. So far as the navigation of this "commoa highway" was concerned, Virginia and Maryland stood toward each other as independent coriparian States. The Constitution put an end to that situation, as indeed for most purposes it put an end to the compact.

Because the National Government can build such a wall to improve navigation, it does not follow that Maryland, having no paramount power over the navigation of this common highway, could have done the same thing. Manifestly no improvement could have been made except "with the mutual consent and approbation of both States." Hence there is no occasion to turn the compact from its obvious meaning and purpose in order to preclude the direful consequence suggested.

The suggestion that our contention would permit Alexandria to be bottled up belongs to that class of arguments which would nullify an otherwise incontestible power of government by an imaginative speculation of the consequences which might follow from an abnormal exercise of it. (*Am. L. Co.* v. *Zeiss*, 219 U. S. 47, 67. *Blinn* v. *Nelson*, 222 U. S. 1, 7.) It would be equally reasonable to argue that *Gibson* v. *U. S.* and *Scranton* v. *Wheeler* can not be law, for if so, the Federal Government could bottle up St. Louis with a seawall and so divert all the Mississippi traffic to Memphis.

The people through the Constitution having invested the Federal Government, as the guardian of the public welfare in that regard, with the paramount and plenary power to control navigation, it is literally true that Congress, if it deemed that course essential to the maintenance and highest utilization of an indispensable waterway, would have power to construct a wall or dyke which might destroy the com-

merce of some locality by cutting off the front of a city absolutely from the water. But why speculate whether the general public interest could ever require any such sacrifice?

New York did, in fact, engirdle a system of monopolized docks by a new system. (*Sage* v. *Mayor*, 154 N. Y. 61.)

Defendant's argument on this head serves to emphasize a vital point which seems elsewhere to be overlooked. *The thing that took away defendant's access was the seawall which cut off its upland from the river.* (R. 6, par. 8.) The right to construct such a wall in the improvement of navigation (as well as the correlative rule that the harm thereby done the riparian owner is consequential and no legal wrong), is already settled. (*Supra*, p. 9.) The circumstance that the mud dug out to improve the channel was deposited in the shallow water behind the wall is but an incident of the improvement. It did not alter the effect already produced by the wall. The issue here being title, the question is simply—on whose soil in point of property was the dredged soil deposited?

IV. THE COMPACT WAS NEVER IN FORCE IN THE DISTRICT OF COLUMBIA.

In *Evans* v. *United States* (31 App. D. C. 550), the Court of Appeals held that—

> the compact of 1785 never was in force in the District of Columbia (p. 550).

That conclusion is the necessary consequence of what this court held in *The Mayor, etc., of Georgetown* v. *The Alexandria Canal Company* (12 Pet. 91):

> The compact made in the year 1785, between Virginia and Maryland, was made by the two States in their character as States. The citizens, individually, of both commonwealths were subject to all the obligations imposed, and entitled to all the benefits conferred by that compact. But the citizens as such, individually, were in no just sense the parties to it; those parties were the two States, of which they were citizens. The same power which established it was competent either to annul or to modify it. Virginia and Maryland, then, if they had retained the portions of territory respectively belonging to them on the right and left banks of the Potomac, could have so far modified this compact as to have agreed to change any or all of its stipulations. They could, by their joint will, have made any improvement which they chose, either by canals along the margin of the river, or by bridges or aqueducts across it, or in any other manner whatsoever.
>
> When they ceded to Congress the portions of their territory embracing the Potomac River within their limits, whatsoever the Legislatures of Virginia and Maryland could have done by their joint will after that cession could be done by Congress, subject only to the limitations imposed by the acts of cession. (12 Pet., p. 96.)

In that case this court decided that, notwithstanding what the compact said respecting the free use of the river by the citizens of both States, Congress had full power to authorize its improvement by canals along the margins or by bridges or aqueducts or in any manner whatsoever (p. 98).

The successive stages in the reasoning by which the compact is shown never to have been in force here may be stated thus:

(*a*) Since the compact was made by Maryland and Virginia in their character as States, it was within their power, by their joint will, at any time to change its terms or abolish it altogether.

(*b*) By the acts of cession both States surrendered all their rights of property, as well as their entire sovereignty within the territory ceded, which included the whole of the river, its bed and its shores on both sides.

(*c*) The absolute power which they possessed over the compact passed immediately to the United States, and whatsoever they could have done jointly the United States could do alone.

(*d*) The vesting of this absolute power in one sovereign, the United States, amounted to an abrogation or dissolution of the compact. The *mutuus consensus*, upon which alone it rested, necessarily came to an end when the two contracting parties were united in one. The compact, therefore, was never in force in the District of Columbia.

As confirming the conclusion thus reached, that court pointed to the fact that, with respect to the

District of Columbia, so unified under one sovereign, there was no function which the compact could possibly perform.

> * * * It was not a consideration in the acts of cession either as to soil or the protection of the vested rights of citizens within the district ceded. It was not essential that it should be, as the entire river within the District of Columbia was under the control of the General Government. The citizens of the District of Columbia on both shores enjoyed equal rights with respect to it. (*Evans* v. *United States*, 31 App. D. C. 550.)

V. THE RETROCESSION TO VIRGINIA DID NOT REVIVE THE COMPACT.

The easements and privileges possessed by Virginia in the river under the compact with Maryland were destroyed by the joint cession to the United States.

Nor were these easements and privileges revived by the retrocession to Virginia of the portion of the original District which came from her.

The act, July 9, 1846, 9 Stat. L. 35, c. 35 (R. 41), provided that—

> * * * all of that portion of the District of Columbia ceded to the United States by the State of Virginia, and all the rights and jurisdiction therewith ceded over the same be, and the same are hereby, ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction as well of soil as of persons residing or to reside thereon.

If the act of retrocession be compared with the act of cession, it will be seen that the former was but a retransfer to Virginia of that identical territory, with the rights and jurisdiction over the same, which was received by the United States from Virginia. Now, the territory ceded to the United States by Virginia was a defined territory extending only to high-water mark on the south side of the Potomac River, which was the boundary line of Virginia as fixed by the grant from the English Crown. From the moment of retrocession the United States, which up to that time, as joint successor of both States, was sovereign of all the territory formerly owned by each, namely, the territory on both shores of the river, as well as the river itself, became and was vested with the same absolute sovereignty over everything that had not been acquired from Virginia, namely, the land to the north of the river and the river itself to the boundary line between the two States. In other words, the original boundary was instantly restored.

But the compact was not restored, either expressly or by implication. The act of retrocession is wholly silent with respect to it. Can one conceive that, if the intention had been to revive it, nothing would be said on the subject? It was obviously the understanding of both parties that the compact had been wholly merged in the sovereignty of the United States as the complete and absolute successor to the rights of both parties to the instrument. Nor was there

any revival by implication. As pointed out by the court below:

> * * * The United States was not a party to the compact of 1785, either originally or by subsequent acceptance of its terms. At the time of the retrocession Maryland was not present at the point of controversy, and there was no one connected with the transaction upon whom Virginia would lay claim to a revival of the terms of the compact. At the time Virginia ceded her portion of the District of Columbia to the United States she ceded certain described territory. It extended to the high-water mark on the south side of the Potomac River, which was the boundary line of Virginia, as fixed by the grant from the English Crown. The easements and privileges she possessed in the river, under the compact, were destroyed by the cession to the United States, and having been lost, they could not be revived by the mere reconveyance of the territory ceded, unless expressly recreated in the act of retrocession. (*Evans* v. *United States*, 31 App. D. C. 544, 552.)

This results from a principle recognized in international as in municipal law. At common law from the instant that the dominant and servient estates are united in the same owner, the servitude is extinguished and does not again arise upon severance unless it be reimposed by express words.

> *Capron* v. *Greenway*, 74 Md. 289, 293.
> *Denton* v. *Leddell*, 23 N. J. Eq. 64, 66.

Rogers v. *Powers*, 204 Mass. 262, 264.

Greenwood v. *Met. Elev. R. Co.*, 12 N. Y. Sup. 919.

Hennessy v. *Murdock*, 17 N. Y. Sup. 276.

Washburn, Easements, sec. 693.

Gale, Easements (8th Ed., 1908), pp. 18, 181, 519.

The same rule of *consolidatio* is also established in the Roman law,[1] from which, as from a vast storehouse of principle, international law, through Grotius and the publicists of the seventeenth and eighteenth centuries, derives so much of its doctrine. (Calvo, Droit Int. I, p. 33.) It is clearly recognized as applicable to international servitudes. (Rivier, Droit des G. I, p. 296, II, p. 141.)[2]

Since the provisions of the compact were not revived, either expressly or by necessary implication, it follows that shore and wharfing servitudes which owed their existence solely to the compact, and were neither continuous nor apparent, were not restored by the retrocession. (*Evans* v. *Dist. of Columbia*, 31 App. D. C. 544, 552.)

[1] *Paulus libro quinto decimo ad Sabinum.* Si quis aedes, quae suis aedibus servirent, cum emisset traditas sibi accepit, confusa sublataque servitus est, et si rursus vendere vult, nominatim imponenda servitus est: alioquin liberae veniunt. Dig. lib. 8, tit. 2, l. 30, pr.

Gaius libro septimo ad edictum provinciale. Servitutes praediorum confunduntur, si idem utriusque praedii dominus esse coeperit. Dig. lib. 8, tit. 6, l. 1, § 1.

Cf. Marcadé, Explic. du Code, t. II, p. 631 (Art. 705). Pardessus, Traité des Servitudes, §§ 16, 296, 299.

[2] Elle [servitude internationale] prend fin d'après les regles ordinaires de nullité ou de resolution des traités internationaux. Elle s'éteint encore par voie d'abandon, de *consolidation* et de renonciation ex presse. Heffter Droit Int. trad. française, § 43, p. 93.

But if we concede that they were revived, what is the consequence? Simply the recognition of rights or privileges would still leave the charter boundary intact and the dominion and sovereignty of the United States coextensive with that which passed by the cession from Maryland. Rights of that character would not prevent the United States from improving the river. (*Infra*, 142.) Nor would the impairment of any such rights make the Virginia upland owner the owner of another and different area of which he was never seized. (*Infra*, 149.) And even assuming that the upland owner got a title in the shore—which is the space between high-water and low-water marks—that would not invest him with title to the bed of the river out to the seawall. (*Infra*, 138–141.)

FOURTH POINT.

The arbitration award of 1877 is not only without binding effect with respect to the boundary between Virginia and the District of Columbia, but it is also without persuasive force as a solemn adjudication upon a similar question.

It is hardly necessary to argue the proposition that the award made by the Virginia-Maryland arbitrators in 1877 neither had nor could have the effect of determining the boundary between Virginia and the District of Columbia. The award was necessarily limited to the subject matter of the submission which was the boundary between those two States.

Nor can the award be regarded even as persuasive upon the question here at issue, for these reasons:

In the first place, the question of high or low water boundary was not before the arbitrators.

The chief point of controversy was not the Potomac, but the Chesapeake and Pocomoke, boundary. It is to that point that the major part of the evidence, as well as of the opinion is addressed. And with respect to the Potomac, the question was not whether the boundary was the high or low water line—for Maryland went into the arbitration conceding the low-water line. For some years prior to the submission, during the efforts to settle these boundary questions by agreement, Maryland has steadily made this concession.

The "Statement on the Part of the Commissioners of Maryland," in 1872, submits to the Virginia commissioners the following line, to be established by compact between them:

> Beginning at low-water mark at the divisional line between the two States of West Virginia and Virginia, upon the southwest coast or shore of the Potomac River; thence following the said river at said low-water mark, to all wharves and other improvements now extending, or which may hereafter be extended, by authority of Virginia from the Virginia shore into the said river beyond low-water mark, and following the said river, around said wharves and other improvements, to low-water mark on the southwestern side thereof, and following the said river in the same manner down to the easternmost angle of Smiths point at the mouth of the said river Potomac, where it flows into the Chesapeake Bay. (R. p. 108, par. d.)

The only issue, then, as to the Potomac was, not whether the boundary line was the line of high or low water (the latter being conceded for the purposes of the arbitration), but whether Virginia could make good her claim to the ***whole of the Potomac*** to the north or Maryland bank, notwithstanding the revocation of the Virginia charter and the subsequent grant to Baltimore.

As already pointed out, *supra*, the mere assertion of a claim to the whole river was proof that Virginia did not understand that the compact had altered the boundary to low water on the south shore. This claim could not, indeed, be maintained. But Virginia earnestly sought to support it in two ways:

(*a*) By the combined effect of the resumption of the government of Maryland by the Commonwealth and the grant to Hopton and others made by Charles II during his exile and confirmed on May 8, 1667, of the northern neck of the colony of Virginia lying between the Rappahannock and the Potomac River. Of this, the Virginia commissioners had said:

> Not only by successful revolution and sovereign power, *de jure et de facto*, was Virginia, by the treaty-making power itself, restored to her ancient limits, but her boundary and jurisdiction on the Potomac River was fixed by royal grant as well as by the articles of surrender to the Commonwealth. (R. 80.)

This contention, grounded on the theory that Charles II was free to give Hopton "the islands

within the banks of the Potomac and the river itself" was answered by the fact that Lord Baltimore and his successors, claiming under the elder grant, had for two centuries exercised full proprietary and political dominion over the river and the islands. But that circumstance does not weaken its effect as evidence that Virginia did not regard the compact as readjusting the boundary.

(*b*) Virginia also sought to support her claim by what was described as "a curious result of survey in demonstrating, perhaps, what the words 'ulteriorem fluminis ripam,' in the Baltimore grant, meant." (R. 81.)

The Virginia statement says that Michler, in running the meridian of the head spring of the Potomac, found that—

> * * * within four or five thousand yards north of the stone and spring his meridian line struck the Potomac River, there running northwest. Instead of running south from the parallel of 40° to the spring, he was running north from the spring to the parallel—exactly the reverse of the course required by the grant. The grantor, as it were, standing on the parallel of 40°, gave a line inclining south from the meridian of the spring to the ulterior bank of the river from his standpoint on the parallel. The river running there northwest and then deflecting west and south until it takes its general course southeast, the ulterior bank of the river was, geographically, the left bank thereof. (R. 81.)

The contention as an application of the charter is extravagant. But the fact that Virginia made it proves that she did not understand that the compact had changed the boundary.

From the foregoing it is plain that in the arbitration there was no substantial issue between the parties with respect to the boundary on the Potomac, and, in particular, that, Maryland being already willing to concede the low-water mark, the question of high-water mark *vel non* was not really before the arbitrators. While the arbitrators differed radically on the contested question of the Chesapeake and Pocomoke boundary, they were naturally in accord in the conclusion reached as to the Potomac. All they had to do was to determine, as they did, that "the intent of the charter is manifest all through to include the whole of the river within Lord Baltimore's grant," and to supplement this with Maryland's concession of a boundary at low-water mark.

But the reasons suggested by the arbitrators why this should follow from the compact are not the grounds of a mature judgment upon a disputed point reached after full discussion by parties interested in maintaining opposite sides of the controversy.

It thus lacks the first requisite of a persuasive—not to speak of a controlling—adjudication.

Pollock v. *Farmers L. & T. Co.*, 157 U. S. 429, 574.

The Genesee Chief, 12 How. 443, 455.

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Confessedly without binding force on the issue here, the finding of the arbitrators is also without efficacy to refute the clear proof that the compact neither had, nor was intended to have, the effect of altering, settling, or adjusting the territorial boundary of Maryland.

FIFTH POINT.

The act of March 3, 1879 (20 Stat., 481), giving the consent of Congress to the agreement or award between Virginia and Maryland, does not make such award applicable to the boundary between the District of Columbia and the State of Virginia.

Defendant offered (R. 66) the act of March 3, 1879 (20 Stat., 481), giving the consent of Congress to the agreement or award between Virginia and Maryland. This offer could have no other object than to show that the award made in respect of the Maryland-Virginia boundary applies to that part of Potomac River which lies within the District of Columbia. But the obvious purpose of the act was to give the consent of Congress, required by clause 10 of Article I of the Constitution, to the compact between the two States. And such was the limit of its scope and effect.

Defendant seeks to give it a different and extended effect by reason of the following language in the proviso:

> That nothing therein contained shall be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands and waters which form the subject of the said agreement or award. (R. 64.)

The argument grounded upon these words seems to be this: That the United States, by reserving "any right of jurisdiction" it might have over the islands and waters "which form the subject of the said agreement or award" thereby extended its operation to islands and waters over which the United States did have jurisdiction, namely, the islands and waters in the District of Columbia. It would not be easy to frame a more obvious fallacy. For the whole operation of the reservation of jurisdiction is limited by its own terms to those islands and waters which "form the subject of the award." All others are necessarily excluded. Moreover, the proviso is a mere saving clause, the effect of which is to reserve whatever right of jurisdiction the United States might have in the premises. It would be an extraordinary thing to construe this reservation into a surrender of jurisdiction.

The proviso expresses merely an abundant caution and safeguards any possible right of jurisdiction the United States might have over any of the islands and waters of the Potomac and Chesapeake Bay lying between the two States, notwithstanding the division thereof made by the award to which Congress was giving its consent.

This is confirmed by the following circumstance: The language appears to have been copied *verbatim* from the act of June 28, 1834, c. 126 (4 Stat. 708), giving the consent of Congress to the agreement or compact entered into on September 16, 1833, between New York and New Jersey with respect to the

boundary line and jurisdiction on the waters near New York. The compact and the consenting statute were the subject of consideration by this Court *in re* Devoe Manufacturing Company, 108 U. S. 401, 415:

> Article second of the agreement provides that "the State of New York shall retain its present jurisdiction of and over Bedlows and Ellis Islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that State." Other articles of the agreement provide for the exclusive jurisdiction of New York or New Jersey over specified waters. In giving consent to the agreement, and "each and every part and article thereof," Congress was consenting, apparently, as against any rights of jurisdiction which the United States then had, to the exclusive jurisdictions of New York and New Jersey, respectively, over the islands and waters referred to. Hence, for abundant caution the clause in question was added. New York had, by an act passed February 15, 1800, 1 R. L. 189, ceded to the United States jurisdiction over "all that certain island called Bedlows Island, bounded on all sides by the waters of the Hudson River, all that certain island called Oyster Island" (known afterward and now as Ellis Island), "bounded on all sides by the waters of the Hudson River," and also Governors Island, reserving to the State the right to serve and execute, on those islands, respectively, civil or criminal process issuing under the authority of the State.

In short, the words of the proviso, as originally inserted in the act of 1834, were intended to relate to islands or waters owned by the United States *which lay within the territory covered by and forming the subject matter of the agreement*, not to lands or waters outside that territory. There can be no reason, then, for attempting, in this case, to apply the same words to lands or waters not within the territory forming the subject matter of the agreement.

As this court points out, the clause was added in 1834 for "abundant caution," since Bedlows and Ellis Islands were by the compact itself confirmed to New York, the grantor to the United States. In the act of 1879 they seem to have been copied from the precedent out of *superabundant* caution, with a view to guarding against the possible case of any islands or waters owned by the United States within the territory covered by the agreement. In both instances the proviso necessarily relates to and is limited by the subject matter of the agreement, viz, the lands and waters in dispute.

SIXTH POINT.

The case of Maryland v. West Virginia, 217 U. S. 1, 577, is not an authority on the question whether the Potomac boundary is high or law water mark, because that point was not litigated.

The substantial question in that case was the long-pending controversy as to the true western boundary of Maryland (p. 26). The point actually decided was that the Deakins line of 1788, by practical

recognition and adoption, had become the fixed line (p. 46). (See *Maryland* v. *W. Virginia*, 225 U. S. 1.)

The boundary on the Potomac was brought into the case by West Virginia's claim in her cross bill that she was entitled to the whole of the Potomac River to the north bank thereof. This claim, which was a palpable makeweight, was treated as already foreclosed by the case of *Morris* v. *The United States*, 174 U. S. 196. A quotation from that case to the effect that the charter of Maryland called for the river to its farthest bank on the south and that this right had not been taken away by any valid proceeding prior to the Revolution was this court's only answer to the contention. (217 U. S. p. 45.)

When a decree came to be settled in accordance with the opinion, it was found that the drafts submitted by Maryland and West Virginia, respectively, differed in two particulars: First, as to whether the boundary along the south bank of the Potomac should be located at high-water mark, as stated in the Maryland draft, or at low-water mark, as stated in the West Virginia draft; and second, as to whether the cost of the survey should be equally divided, as suggested by Maryland, or, as suggested by West Virginia, that each State should bear its own expense.

As to the first particular, the court said:

> In the former hearing, however, and in the decision rendered, the attention of the court was not directed to the question whether the boundary of Maryland should be at high-

> water mark or at low-water mark along the southern bank of the Potomac River (p. 578).

The court then stated the history and result of the arbitration of 1877, which gave Virginia a proprietary right on the south shore to low-water mark, by reason of her assent to the compact of 1785, and said:

> The compact of 1785 (see Code of Virginia, v. 1, title 3, ch. 3, par. 13, p. 16) is set up in this case, and its binding force is preserved in the draft of decrees submitted by counsel for both States (p. 580).

It was upon this basis alone that the court proceeded to say that it agreed with the arbitrators in the opinion that—

> * * * the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac River shall extend to high-water mark.

The decree was drawn accordingly.

Nothing can be plainer than that Maryland was not pressing a claim to the high-water line. The total failure to mention the subject at the hearing of the cause is a sufficient proof of that. Witness, also, the voluminous record, substantially the whole of which is directed to the western boundary line. As for the Potomac, West Virginia having set up a claim for the entire river, Maryland contented her-

self with meeting that extravagant claim and said nothing about high or low water mark, the latter of which, as to Virginia, she had long since accepted as her Potomac boundary. The case was fought to a finish on the real controversy.

The question of high or low water mark came subsequently into the case only by reason of the court's having apparently indicated, by its quotation from the *Morris* opinion, an understanding that Maryland, owning the river, must own to high-water mark. Although they had not theretofore asserted any such claim themselves, "and the court's attention had not been directed to the question" (p. 578), Maryland's counsel, manifestly out of deference to the court, framed their draft decree in that sense. As both drafts recognized the binding force of the compact, the court readily adopted the conclusion of the arbitrators, which Maryland herself had never disputed, and was not then disputing.

Plainly, the question of high or low water mark was not litigated before the court, and the opinion concerning it can not be deemed a binding authority on the question. (*The Genesee Chief*, 12 How. 443, 455; *Ex parte* March, 57 Fed. 719, 730.)

As already pointed out (*supra*, p. 80), the conclusion of the arbitrators was really grounded upon the concession made by Maryland in the preliminaries to the arbitration and was not a decision upon a contest as to high or low water mark. To fortify the conclusion, indeed, the arbitrators added, without discussion, a bald statement that the privileges

reserved by the compact are inconsistent with Maryland's continuing her claim to her charter boundary. It is this which the court contented itself with repeating.

But we submit we have shown that it is impossible to translate the privileges of the compact into terms of territorial boundary and that there is not, either by municipal or by international law, any inconsistency between retention of title to high-water mark and the concession of the privileges accorded to Virginia.

SEVENTH POINT.

The boundary line between the District of Columbia and Virginia is not determined by imaginary straight lines drawn from headland to headland along the river.

The mere substitution of a low-water for a high-water boundary line would still leave practically the whole of the reclaimed area within the District of Columbia. In order to defeat this action, defendant is forced to contend not that the compact changed the boundary from the high to the low water line, but that it changed it to a series of imaginary straight lines drawn at low-water mark from headland to headland.

I. NO HEADLAND TO HEADLAND DOCTRINE.

This claim for a river boundary running in straight lines is nothing less than startling. There are several State boundaries extending along the further river bank, drawn, in some instances at high, in others at low-water mark. For example, the Kentucky-

Ohio boundary on the Ohio River; the Kentucky-Indiana boundary on the same river; the Alabama-Georgia boundary on the Chattahoochee River. But so far as we are aware, it has never been contended that any such boundary should run in straight lines from headland to headland across the ordinary indentations and sinuosities of the shore. Of course, where an interior stream flows into the boundary river, the frontier line is drawn across its mouth, so as not to give the opposite States access to the interior of each other. But that is an altogether different matter.

The defendant's contention respecting the Potomac is derived solely from the language employed by the arbitrators in the Virginia-Maryland award of 1878. It seems to be due to a misconception of certain international law notions with respect to external maritime boundaries. Interstate rivers offer no opportunity for the application of such notions, even if their validity be admitted. But, so far as the public law of the United States is concerned, the headland-to-headland doctrine, as such, has never been accepted, even for the seacoast.

> The headland theory, as it is called, has been uniformly rejected by our Government, as will be seen from the opinions of the Secretaries above referred to. The following additional authorities may be cited on this point:
>
> President Woolsey makes the following comment on the "headland" claim: "But such

broad claims have not, it is believed, been much urged, and they are out of character for a nation that has ever asserted freedom of doubtful waters, as well as contrary to the spirit of more recent times.

In an opinion of the umpire of the London commissioners of 1853 it was held that: "It can not be asserted as a general rule that nations have an exclusive right of fishery over all adjacent waters to a distance of 3 marine miles beyond an imaginary line drawn from headland to headland."

* * * * *

We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond 3 miles from low-water mark and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland and makes it follow closely, at a distance of 3 miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign. (Bayard to Manning, May 28, 1886; 1 Moore, Int. Law Dig., pp. 719, 720.)

II. NO MARITIME HEADLAND LINE EXCEPT ACROSS LANDLOCKED WATERS.

In some cases, it is true, maritime boundaries have been defined by a straight line between headlands. That was not because a water boundary, as such, runs from headland to headland, but because in the particular instance the headlands marked the entrance to an estuary or bay *wholly inclosed within the territory of the adjacent State.*

The line is drawn thus because, in the language of Mr. Secretary Jefferson, such tributary rivers and bays are, "as being landlocked, within the body of the United States." (Jefferson to Hammond, Nov. 8, 1793; 1 Moore, Int. Law Dig. 703.)

The matter was similarly put by Secretary Pickering in a letter to the lieutenant governor of Virginia, September 2, 1796:

> * * * any waters or bays which are so landlocked as to be unquestionably within the jurisdiction of the United States, be their extent what they may. (1 Moore, Int. Law Dig., p. 704.)

Such cases have no relation whatever to marginal waters. *Nor does a high or low water boundary line ever run from point to point across ordinary indentations or sinuosities of the shore, such as the so-called "Battery Cove."* The reason of the thing was stated by Attorney General Randolph in his opinion concerning Delaware Bay. Nations are conceded the right to draw such a boundary for the purpose of "prohibiting foreigners from gaining, without per-

mission, access into the heart of their country." (1 Op. A. G. 32.)

Obviously, only tributary rivers and bays distinctly enclosed within the State's own territory fall within the principle. Mere sinuosities and indentations, not landlocked, afford no access into the heart of the country.

In the international field, familiar illustrations are the Chesapeake and Delaware. The reasons upon which the principle rests are admirably elucidated in Mr. Randolph's opinion. "The corner stone of our claim," he says, "is that the United States are proprietors of the lands on both sides of the Delaware, from its head to its entrance into the sea." The river and the bay of Delaware are identical. They form one body of water which, *arising* within the territory of the United States and *not leading* from the sea to the dominions of any foreign nation, is enclosed for its *entire* distance by lands in the ownership of the United States. To such a body of water may be applied the principle stated by Grotius that the water belongs to him who is in possession of the land on both sides, though it be open above, as a gulf, or above and below, as a strait, provided it is not so great a part of the sea that, when *compared* with the lands on both sides, it can not be supposed to be some part of them. (Grot. *De Jur. Bell. et Pac.*, Bk. 2, c. 3, sec. 7.) Otherwise foreigners would have, through the Delaware, access into the heart of the country. (1 Op. A. G. 32.)

For the same reasons the Chesapeake was held to be within the United States by the Court of Commissioners of Alabama Claims.

> Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it can not become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig *Grange* and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the "high seas" within the meaning of the term as used in section 5 of the act of June 5, 1872.
>
> *Stetson* v. *United States*, 32 Alb. Law Journal, p. 484.
>
> 1 Moore, Int. Law Dig., p. 741–742.
>
> Moore, Int. Arbitrations, IV, 4332–4341.

These cases, as well as those of the Bristol Channel and Conception Bay, show conclusively that the

headland principle has no relation whatever to mere sinuosities and indentations. It is confined either to the mouths of tributary streams or to landlocked harbors or bays inclosed and defined by well-marked headlands. (*Direct U. S. Cable Co.* v. *Ang.-Am. Tel. Co.*, L. R., 2 App. Cas. 394, 418.) This is, indeed, necessarily imported by the recognized term "*fauces terrae.*" The waters claimed as territorial must be held, as it were, in the jaws of the land.

When the principle is sought to be extended to waters other than tributary streams, the actual configuration and dimensions of the waters claimed must be looked at to determine whether or not they can be truly said to be inclosed within the claiming State. It will be found in fact that nearly all of the bays across which boundary lines have been permitted to run from headland to headland are formed by the mouths of one or more tributary streams. Indeed, the physical situation makes it impossible, *in any case of a boundary on a river*, to draw a headland line except across the mouth of a confluent or tributary stream. For, on rivers, there are, generally speaking no bays.

III. BATTERY COVE A PART OF THE OPEN RIVER.

The distinction is illustrated by the very locality in question. Jones Point, if it be a headland at all, is a headland of Hunting Creek, the opposite bluff being the other. A boundary might very well run from one of these headlands to the other across the mouth of Hunting Creek. *But Jones Point is not a*

headland to a mere curve or indentation in the shore, such as Battery Cove.

Could it be fairly said, even when the point at the north end was natural, that all the water extending from there to Jones Point, with the indentation called Battery Cove, was inclosed within the territory of Virginia? Clearly this part of the river is not landlocked. Its waters do not thrust themselves into the territory of Virginia in such a way as to give access to her interior unless a line be drawn across the mouth.

> How is it to be considered as interior? It is quite open and patent to the sea. There are no headlands which shoot beyond, so as to make what are called chambers, no shores projecting *extra*. (*The Twee Gebroeders*, 3 Rob. (Adm.) 336, 341.)

In fact, it has no mouth, no *fauces terrae*, and its waters are not to be distinguished from the general body of the Potomac. Obviously, the so-called cove is merely a part of the marginal waters. In every case where a boundary is permitted to be drawn from headland to headland the waters are physically inclosed within the State. In a case such as this they are merely adjacent to the State.

But should we concede its validity in general, an attempt to apply the headland doctrine to mere indentations of a river shore presents such difficulties as to be, in effect, impossible. How far, for example, might the beginning and the end of the indentation be apart? What would be the result where there

is a double bend in the river, each bordering State having a promontory or headland jutting into a cove inclosed by headlands on the opposite shore?

IV. AN ARTIFICIAL EXTENSION IS NOT A HEADLAND.

Even if we should accept the headland doctrine in relation to rivers, there is an insuperable difficulty in the way of applying that doctrine to this case.

What is claimed for the northern terminus of the straight line, viz, Lumley Point, has been artificially extended by filling for a considerable distance into the river. (R. 8.) If Virginia has, as defendant claims, a right to make artificial extensions at will, and if the boundary runs in straight lines between headlands so made, the obvious result would be this—the undoubted dominion and ownership of the river possessed by the United States could be nibbled away, bit by bit, each encroachment by filling into the water at one point resulting in the drawing of a new straight line by which an additional area of water would be withdrawn from the jurisdiction of the acknowledged owner of the stream.

It would be no answer to this to say: "We do not claim a line drawn from Lumley Point as extended, but from Lumley Point as it formerly existed," For a headland call is *a call for a natural, existing object*—something by which it can be determined whether other objects, such as vessels or the like, fall within or without the limits of the bordering State.

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An object which has ceased to exist does not aaswer such a call. It is not feasible to have an ideal line across moving waters run from an obliterated point, the location of which can be discovered only through borings or similar tests made by expert topographical engineers, or by studiously comparing data to be found only in rare maps, with the latest survey of the existing physical situation. A headland call must be gratified by an open, definite, permanent, visible object, or it is nothing.

V. LUMLEY POINT NEVER AN EXTREMITY OF BATTERY COVE.

Defendant's claim for a headland line from Jones Point to Point Lumley (Duke Street) proceeds upon an assumption of fact not borne out by the proof. *These points have never been the extremities of an indentation comprising Battery Cove.*

The earliest plat we have (Ex. 9), is a tracing of a map made from a plat now lost, indicating the lines of the Howsing patent of February 26, 1668. It shows (*a*) that Hunting Creek was the only inclosed body of water in this region, (*b*) that what is now called Battery Cove was but one of many minor indentations along the river shore, and (*c*) that it lay not between Jones Point (Piper's Island) and Point Lumley, as defendant says (Br. p. 18), but between Jones Point and an intermediate point in the line of the present Franklin Street. Between the last-mentioned point and Point Lumley was a second indentation, and between Point Lumley and Point West was a third.

Nor, despite the extensive filling done there, did Lumley Point ever come to inclose Battery Cove. The map of Alexandria in 1798 (Ex. 14) shows that the eastern end of Franklin Street then extended *farther* into the river than Point Lumley, and their relative positions were practically unchanged when the improvement began. If, by some stretch of the imagination, Battery Cove is to be regarded as land-locked, its extremities are Jones Point and the point at Franklin Street.

Defendant's straight line would have to run, if at all, between these points, leaving much of the *locus* still in the District.

But Jones Point itself has been made by connecting the original Pipers Island with the mainland, and the point at Franklin Street, like Point Lumley, has been much extended by filling. (Rec. 8.) Therefore, Battery Cove, as it existed in 1910, was not a natural curve in the shore, but one which, slight as it was, had been created largely by artificial means. And Exhibit B, which enables us to compare the shore line just before the improvement with the shore line of 1845, as delineated on Exhibit 7, shows much of this extension of Franklin Street to have been made since that date. None of these points, then, is a natural promontory or headland. Facts like these demonstrate how preposterous it would be to run a headland line from an artificially created point which masks the obliterated natural shore line a long way inland.

Whether we regard Lumley Point at Duke Street or the point at Franklin Street intermediate between it and Jones Point as the northern terminus of the indentation we are confronted with the same difficulty. The existing point in present contact with the water can not be taken, **because it is an artificially created point and not a headland.** The old and obliterated point, now some distance inland, can not be taken **because, if ever a headland, it is one no longer.**

VI. HEADLAND BOUNDARY INCONSISTENT WITH OWNERSHIP OF THE WHOLE RIVER.

This is a fundamental reason against defendant's contention. Whatever may be its effect on the question of the high-water or low-water line, the compact contains not a word indicating an intention to take away the property and dominion of the river itself expressly granted by the Maryland charter. The words of that charter carry ownership to the water's edge on whatever acclivity or shore contains the stream and means that both the waters and the bed on which they flow are the property of the grantee. (*Alabama* v. *Georgia*, 23 How. 505, 514.)

As the grantee's successor, the United States is similarly entitled to the whole of the Potomac. Virginia is only entitled to what is not part of the Potomac. Tributary streams arising in Virginia, so far as they continue recognizable as such, are not part of the Potomac. Above the headlands which form their mouths, they constitute part of Virginia.

But the waters of the Potomac itself are not part of Virginia and it makes no difference whether the "farther bank" which holds these waters be straight or curved. The river is a definite thing and it belongs to the United States.

If this ownership were affected by the curvature of the containing land, then it is conceivable that the United States might lose its ownership of the bed of the channel of the river. For the channel is sometimes on one side, and sometimes on another, and a bend in the Virginia shore, where the bank is sheer, might, for instance, bring the channel itself within a line drawn from headland to headland.

VII. THE AWARD OF 1878 THE SOLE SOURCE OF DEFENDANT'S CLAIM.

It will be found, we submit, that from no point of view is it possible to apply a headland-to-headland theory to the present state of facts, where one bordering State owns the whole of the river and the boundary is to follow the farther bank thereof. The attempt to apply it is simply *an attempt to apply the Maryland-Virginia line established by the award of 1878*, which has nothing whatever to do with the boundary between Virginia and the District, is purely conventional, and does not purport to be the boundary called for by the charter.

It is solely from that award that defendant derives its notion that the water line on the Virginia shore, to which our dominion and property extend, should be measured "from low-water mark at one headland

to low water at another, without following indentations, bays, creeks, inlets, or affluent rivers." (R. 64.) And its only conceivable basis is the erroneous assumption made in the award that the territorial rights of the parties are to be determined not by the charter line, but by the extent of the wharfing privileges conceded by the compact of 1785.

The unwarrantable translation of such privileges into territorial dominion, while it would result in leaving the boundary line open to perpetual change, would yet accomplish, in a rough way, what the headland notion does. It would carry Virginia, *in posse* if not *in esse*, to the line of the channel; just as lines from headland to headland on a river would be equivalent, in large measure, to a line drawn along the channel.

The headland notion is thus an indirect device for giving Virginia territorial dominion to the channel, but the compact had no such purpose.

EIGHTH POINT.

Domestic statutes of Virginia, authorizing extensions of the city of Alexandria, do not have the effect of making a new interstate boundary.

In Section V of the stipulation (R. pp. 68–77), the defendant put in nine acts of the Virginia Assembly which are claimed to have the effect of extending the limits of the city of Alexandria to a straight line drawn in the Potomac from Jones Point northward in such manner as to make such line the boundary between Virginia and the District.

These acts, which range in date from the year 1772 to 1871, naturally fall into three classes:

(1) Acts passed before the cession.

(2) Acts passed after the cession, but before the organization of the District, while the provision of the Virginia cession continuing "the jurisdiction of the laws of this Commonwealth over the persons and property of individuals" remained in force.

(3) Acts passed after the retrocession to Virginia.

(A) We challenge the construction defendant places upon these acts. But it is manifest that, conceding it, they can not have the effect claimed for them.

I. With respect to those passed *before the cession*, viz, shortly before, during, and after the Revolution, the circumstance that Maryland did not take notice of these domestic, intraterritorial statutes can not be deemed an acquiescence in the claims they imply, especially when we remember that as soon as Virginia, in her constitution of 1776, made an open, public declaration of her claims on the Potomac, Maryland at once emphatically and solemnly repudiated them. (R. 14–15.)

Nor can an acquiescence in Virginia's claims be deduced from Maryland's having failed, during that time of stress, to prevent by force of arms the filling in of a block or two along the Virginia shore as an addition to the town of Alexandria. While the land so made, regarded as an accomplished fact, may be treated as having become part of the soil of Virginia (the boundary at that particular point thereafter

running with the new water line thus formed), Maryland's failure to prevent that ***one encroachment*** can not be deemed, in the face of her express denial of Virginia's right to make it, a concession of a general right to make similar encroachments without limit in the future. Giving the fullest effect to the actual adverse occupancy by Virginia of the particular land thus made, there is not, as to the rest of the river not so filled in and occupied, "that long acquiescence in the *practical* locating of a common boundary and *possession* in accordance therewith, which in some of the cases has been treated as an aid in settling the question at best." (*Arkansas* v. *Tennessee*, 246 U. S. 158, 172.)

These considerations would seem to dispose of the first three of the acts offered, those of 1772, 1782, and 1785. (R. pp. 69–72.)

II. We pass now to a consideration of what was done ***after the cession.*** Several important things must be borne in mind.

After the cession, the sovereignty of the land on both sides of the river, as well as the river itself, was in the United States. Whatever power the Assembly of Virginia had to legislate with respect to so much of the territory as had been ceded by her was limited, just as in the case of the Maryland Assembly, by the act of cession to laws "over the persons and property of individuals residing within the limits of the cession aforesaid."

This meant no more "than to say that the laws which affect private rights should continue in force

until proper provision was made by Congress." It had no application whatever to property held by the sovereign, or to matters of public law."

Morris v. *United States*, 174 U. S. 196, 241.

Shoemaker v. *United States*, 147 U. S. 282, 307.

Inasmuch as, by the acts of cession, the dominion and property of the whole river, including its bed, were vested in the United States, they could not be affected by any law thereafter passed by the Assembly of Virginia. Nor could anything be done by Virginia to impair any rights which the United States had acquired by the cession from Maryland. Moreover, the temporary continuance of Virginia law, for whatsoever purpose, was expressly confined to the limits of the territory ceded by her. It could not extend over territory which the United States obtained, not from her but from Maryland.

After the cession there was in fact no boundary to be changed or affected by the act of either State. So much for the Virginia acts passed during the period before the actual removal of the seat of government. It will be convenient here to say a word as to certain legislation after that date.

When Congress, by the act of 1801, organized the District, it placed the river in both counties. (Rec. 19.) Thereafter all legislation relating to the corporation of Alexandria, as well as that relating to the corporation of Washington, derived its authority from the United States. Any act affecting the

river, therefore, in so far as it is valid at all, acquires its validity from the express or implied consent of the United States. To put the matter concretely, if the corporation of Alexandria between the cession and the retrocession authorized land to be filled in along its water front, whatever was thereby validly accomplished is the result of congressional authority and is therefore not adverse to any right claimed or possessed by the United States, either as the successor of Maryland or as the successor of Virginia. Acts thus done by the consent of Congress while sovereign of both shores imply no right to do similar acts after Congress, by retrocession to Virginia, reestablished a boundary between the two sovereignties and held the river by its Maryland title.

In fine, statutes and ordinances, such as the act of 1798, passed during the period of single sovereignty, are without significance in respect of questions which can only exist when sovereignty is separated. Acquiescence by Congress in the city limits claimed by Alexandria while the river was in both counties is without weight on the question of interstate boundary.

III. What was said respecting the statutes passed during the period before the cession applies equally well to those **passed after the retrocession.**

It may be fully conceded that where the opposite sovereign, under a claim to improve or extend to low-water mark, does in fact fill in land to that line and exercise unquestioned dominion over it for a

long period of time, the particular land actually so made may be regarded *pro tanto* as withdrawn from the river and a new boundary around that land may be taken as established by acquiescence. (*Indiana* v. *Kentucky*, 136 U. S. 479, 510.) But it **does not follow** that failure to prevent such action in a particular instance and at a particular place amounts to **an acknowledgment of the right of engaging in such action in general,** or to a concession of a similar boundary **in other places.** It is the fact of occupancy, and not the claim, which works the change. (*Arkansas* v. *Tennessee*, 246 U. S. 158, 172.)

Such a result would not follow from a mere paper claim to have jurisdiction down to an imaginary line on the water and to fill in accordingly. Against such a claim the legal title must prevail. The opposite sovereign, having and asserting that legal title, would not be concluded by a domestic, internal, municipal statute declaring that the limits of a subsidiary political division should extend on paper outside of the true interstate boundary. If, then, the acts of 1860 and 1865 really say that the eastern limit of the city of Alexandria shall be an imaginary straight line from Jones Point to Four Mile Run, such imaginary line does not become a substitute for the true charter boundary which calls for the high-water mark. The Virginia acts of 1860 and 1865, conceding the construction placed upon them, are wholly without bearing on the present controversy.

(B) *None of the statutes offered admits of the construction claimed.*

It is easy to make a general claim that these statutes evidence acts of proprietary right, jurisdiction, and possession over the soil in question. But the claim will not bear analysis.

(*a*) The first is the act of 1772. (R. 69–71.) Reciting that certain marsh land constituting, under former acts, an addition to the town of Alexandria had been left undrained and unimproved, this act provides simply that the owners of such marsh lots must drain the same within two years under penalty of forfeiture. Its only other provision is to vest the wharf at Point West in the trustees of the city and to confer upon them the power to take wharfage. It does not touch the area in question. Obviously, there is nothing in this act of which Maryland was required to take notice, nor is there anything in its execution which she was required to prevent. It is wholly without significance upon the question of boundary.

The second act is that of October, 1779. (R. 71, par. *b*.)

This act is but a supplement to the former. It seeks to accomplish two objects: First, to supply a want of power in the town trustees to enforce the forfeitures of lots in Alexandria's subdivision occasioned by breach of the condition to build thereon within two years, such breaches being due, the act says, to "the great scarcity and difficulty of procuring materials * * * during the present war

with Great Britain." The act gives the purchasers a further period of two years.

(*c*) We come next to the act of 1782. (Rec. 72, par. *c*.)

It, also, is confined to two provisions. The first empowers the mayor and corporation to lay a wharfage tax at the wharf belonging to the town, and to apply the money arising therefrom to the use of the town. The second authorizes the extension of Water Street and Union Street. This extension was, in fact, made. Upon the principle already stated, the land so made, which is an integral part of the city of Alexandria, built upon, occupied, and governed as such, for more than a hundred years, must now be regarded as a portion of the territory of Virginia. But the fact that the assembly authorized a subordinate political division of its own Commonwealth to take this step can not be regarded as establishing a right to do the like in the future. Virginia passed this domestic act, after the public declaration of Maryland, made in reply to the assertion of a Virginia right in the river, that—

> the sole and exclusive jurisdiction over the said river Patowmack, * * * belongs to this State,

and that—

> the State of Virginia hath not any right or title to any of the territory, bays, rivers, or waters, included in the charter granted * * * to Caecilius Calvert, baron of Baltimore. (Rec. 14–15.)

(*d*) The fourth act is that of October, 1785 (R. 72, par. d.)

This is the first act that expressly extends the limits of the city. It being desirable, the act points out, for "the ornament of the town * * * as well as the convenience and health of the inhabitants thereof" that the streets be laid off and extended in a regular and uniform manner, and that the territory adjacent to it should be regulated, a "district round the town" is declared to be subject to regulation by the authorities of the city whenever the proprietors of the lands therein incline to open them up. It is a sort of highway-extension plan. The boundary of the district thus conditionally added, however, begins at the bank of Great Hunting Creek, runs in a straight line parallel with the north and south axis of the city, at a distance inland of one mile from the courthouse, to Four-Mile Run, thence down the run to its confluence with the Potomac, thence southwardly to the mouth of Great Hunting Creek and up the creek to the beginning. While the inland line from Great Hunting Creek to Four-Mile Run is a straight line parallel with Fairfax Street, the line called for from the confluence of Four-Mile Run and the Potomac River "southwardly down the said river to the mouth of Great Hunting Creek" is not a straight line. On the contrary, the call is entirely gratified by a line running along the shore between those two points. (*Brown* v. *Huger*, 21 How. 305, 320. *Rogers* v. *Mabe*, 15 N. C. 180, 194. *Smith* v. *Auldridge*, 2

Hayw. 382.) This statute is not even a paper claim to extend Alexandria into the Potomac. This conclusion is confirmed by the direction given for the extension of the streets. The north and south streets are directed to be extended—

> * * * southwardly to Potowmack River or Great Hunting Creek, as the case may be, and northwardly to Potowmack River, or Four-Mile Run, as the case may require. (R. 73.)

If the eastern boundary had been a straight line from Four-Mile Run to Great Hunting Creek, the *north and south* streets could terminate only in the creek or the run, and not in the river at all. The fact that such streets are to be extended to the creek *or the river*, or to the run *or the river*, shows conclusively that they stop when they strike the incurving shore of the river and that the eastern limit of the city is the actual meander line between land and water.

(*e*) The next act to be considered is that of January 8, 1798. (R. 74.)

This extends jurisdiction of the city officers to vessels lying at a wharf "projecting from the said town" and also to vessels made fast to other vessels lying at a wharf or in the dock or the waters within the wharf. These provisions would seem to be inconsistent with the claim that the prior act had extended the city to a straight line from Four-Mile Run to Great Hunting Creek, for in that case all waters within the wharves would have been already

inclosed by such a line. It is quite plain, also, that the framers of this act regarded the town as something different from "the wharves projecting *from* the town." This act, itself, does not purport to extend jurisdiction over all waters included by a straight line between the points named, but only to vessels lying at a wharf or in a dock or within the waters inclosed by a wharf. ***Nor, indeed, does the act purport to touch the soil or any fixed object within the water line.*** It relates only to floating objects for the time being connected with the wharves of the town. (*Roberts* v. *Fullerton*, 117 Wis. 222, 226.) As pointed out above, this act was passed after the cession to the United States under the provision which continued temporarily "the jurisdiction of the laws of this Commonwealth over the persons and property of individuals" within the territory ceded. Neither it nor any other act could affect the property or impair the rights of the United States acquired by the Maryland cession. Nor could it change the public law. Any effect it may have in the domain of jurisdiction must be ascribed to the consent of that Government which, at that time, possessed the sovereignty over both shores of the river, and can not be taken to diminish or impair that sovereign's rights and jurisdiction.

(*f*) The defendant next offers a series of acts passed respectively in 1852, 1853, 1858, 1860, 1865, and 1871, amending the charter of Alexandria and extending and redefining its limits.

The first two acts (R., 102–103) make extensions of the city to the north and are not concerned with the *locus*. The act of 1860 is the one upon which defendant appears chiefly to rely. This act describes the limits of the city as "Beginning on the Potomac River, at a point distant northerly in the direction of Fairfax Street, five hundred and ninety-five feet nine inches from the north line of Montgomery Street, as now established in said city, and extended into said river," thence, by certain courses, around the northern and western boundaries of the city to the line between Alexandria and Fairfax Counties (the old District line), "thence southeasterly, along said line, into the Potomac River," and thence "up said river to the beginning." (R., 75.) The same language is repeated in the act of 1865. (R., 76.) The construction placed upon these words by the defendant is that "up said river to the beginning" means "up said river *by a straight line* to the beginning." Such, we submit, is neither the natural nor the technical construction of such a call. "Up said river to the beginning" means no more than "along," "with," or "by said river to the beginning." The word "up" is used to indicate the direction. In all other respects it is precisely equivalent to "along," "with," or "by." and runs with the meander line. Such is the construction which would be placed upon any deed with a similar call. (*Rogers* v. *Mabe*, 15 N. C. 180, 194; *Buckley* v. *Blackwell*, 10 Oh. 508, 510.)

And there is no assignable reason for giving the words a different meaning in this act, in which,

wherever a straight line is meant a straight line is called for. (Cf. *Thomas* v. *Godfrey*, 3 G. & J. 142, 152.) This call for the river side begins at one point on the river where it is intersected with the old District line. It ends at a similar point on the river 595 ft. 9 inches north of the line of Montgomery Street. The call between those points is "up the river." This is a clear case of a call for the actual course of the river between the points thus fixed. None of these acts can be construed as express and unequivocal claim to withdraw any defined part of the river from the dominion of the United States. Nor is there anything whatever to show acquiescence by the United States in such a pretension.

Most of these acts are substantially contemporaneous with the declaration by Congress in the first section of the Revised Statutes relating to the District of Columbia that the District—

> is that portion of the territory of the United States ceded by the State of Maryland for the permanent seat of government of the United States, including the river Potomac in its course through the District and the islands therein. (R. 29.)

In the face of this enactment it is not clear how a court sitting for this District can give effect to an inconsistent claim on the part of Virginia to draw into the limits of one of its own towns a portion of that river in its course through the District.

At the worst, we have claim for claim, statute for statute. In such a conflict the legal title must control. *United States* v. *Texas*, 162 U. S. 1, 88–89.)

(*g*) In addition to the acts just considered, defendant offers an act passed by the Virginia Assembly in 1848 respecting the Alexandria Canal Company. The only provisions which would seem to be at all germane to the discussion are these:

Section 1 gives the company authority—

> * * * to construct such wharves, piers, basins, and other works on the Potomac River, at or near their present outlet locks, as they may deem necessary and proper for the accommodation of the trade of their canal.

Section 2 confirms the company—

> * * * in the full use and enjoyment of the right and title to, all real property hitherto conveyed to or acquired by them.

It also authorizes them to accept a conveyance of the—

> * * * privileges and other things now held by George H. Smoot for said company, at and near the Georgetown ferry.

Section 4 authorizes them—

> * * * to contract and agree for the purchase of all lands * * * necessary * * * to construct any of the works mentioned in the first section of this act; and also all land necessary and convenient for coal depots not exceeding 5 acres. (Rec. 77.)

The argument is that Virginia's granting authority "to construct wharves, piers, basins, and other works on the Potomac" is incompatible with ownership and jurisdiction in the United States up to high-

water mark. If so, is it not equally incompatible with ownership and jurisdiction up to low-water mark, or, indeed, with ownership and jurisdiction beyond the line of the channel? At all events, the force of this argument must be measured by the degree to which the United States, as owner up to high-water mark, was called upon to oppose, or at least to protest against, the claim supposed to be implied in the Virginia statute. Now, in fact, nothing whatever was being done by Virginia which was incompatible with the interests and purposes of the United States as owner of the river up to high-water mark.

Eighteen years prior to this act, while the county and city of Alexandria were still within the District, Congress had incorporated the Alexandria Canal Company and empowered it—

> * * * to cut canals, erect dams, open feeders, construct locks, and perform such other works as they shall judge necessary and expedient for completing a canal, from the termination or other point on the Chesapeake and Ohio Canal, to such place in the town of Alexandria as the board of directors shall appoint. Act of May 26, 1830, c. 104 (6 Stat. 419).

The corporation was given the power to agree with the owners "for the purchase or use and occupation" of whatever land was needed for the canal or any of its appurtenant works, including "the land necessary for the construction of a basin at the

termination of said canal at Alexandria." Wherever agreement was impossible, the company was authorized to condemn by means of an inquest conducted by the marshal of the District of Columbia. (Sec. 13.)

In respect of the construction of the canal the company's powers extended as well to "any of the works thereof, locks, dams, ponds, feeders, tunnels, aqueducts, bridges, or works of any other description whatsoever appurtenant thereto." Under these powers the company did, in fact, construct an aqueduct on piers across the Potomac River, as well as a terminal basin and outlet locks at Alexandria.

Thus the company already had the authority of Congress to accomplish the objects of its creation by the construction of appurtenant works of any kind that it might deem expedient. How, then, can an act confirming the company in the property thus acquired and authorizing it to construct further works necessary and proper for the accommodation of its trade, be construed as the assertion of anything inconsistent with the rights and interests of the United States?

The simple fact is that the retrocession had placed the company in the position of a foreign corporation, and its power to acquire or condemn land, being limited in terms to the District of Columbia, was no longer applicable to the area which, by the retrocession, had become a part of Virginia. It was perfectly natural that the Virginia Assembly, called

upon to pass an act making the company's power applicable to that area, should also confirm its title to real property theretofore acquired and authorize it to do the things proposed, although they were clearly within the scope of the congressional authority it already possessed.

This legislation asserted nothing adverse to the United States. Nor was the United States called upon, under penalty of an unfavorable inference, to prevent the consummation of what it had itself desired and authorized the company to do. Such an inference could only be drawn in the event that Virginia authorized the company to do something which Congress had forbidden, or at least not authorized, it to do. Clearly, Virginia had done nothing of the kind.

In *Georgetown* v. *Alexandria Canal Company* (12 Pet. 91) it was urged that the execution of the canal company's powers under the act of May 26, 1830, would infringe the rights secured by the compact of 1785. It was in reply to this that this court held that, notwithstanding the compact, Congress had the power to make any improvement it chose, "either by canals along the margin of the river, or by bridges or aqueducts across it, or in any other manner whatsoever." It was the execution of that power which Congress had validly delegated to the Alexandria Canal Company.

NINTH POINT.

Defendant has not shown any such long-continued possession of and exercise of dominion and sovereignty over the area in controversy as would be equivalent to the location by acquiescence of a common boundary line transferring that area to Virginia.

The facts already discussed, especially under the second and eighth points, would seem to render extended argument under this head unnecessary. It is important to observe, however, that in dealing with this subject defendant blends together two questions which are fundamentally distinct, viz:

(1) Whether there is proof of any such long-continued actual occupation of, and exercise of sovereignty over, the area in suit as would be tantamount to acquiescence in the location of a new boundary line placing it in Virginia.

(2) Whether the United States and its predecessors in title have acquiesced in the general claim put forward on behalf of Virginia that her territorial boundary extends on this part of the Potomac to lines drawn from headland to headland at low-water mark and, *consequently*, includes the area in suit.

I. NO ACTUAL ADVERSE OCCUPANCY OF THE AREA.

There is no evidence whatever *of any actual occupation of the locus in quo* adverse to the title held by the United States, prior to the improvement begun by the Government in 1910. Throughout the entire history of the river down to that date,

the area in dispute was an open and obvious part of the stream, and the land within it was parcel of the river bed. Compare Ex. 14 [1798], Ex. 2 [1804], Ex. 7 [1845], and Ex. 4 [1908]. The United States had all the possession of which the soil, as river bed, was susceptible. The record presents none of the elements found in the cases of land boundary where the prescriptive principle has been applied. We have not, for example, any boundary line "run out, located, and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years," to bring it within the rule of cases like *Virginia* v. *Tennessee* (148 U. S. 503, 523).

It may be appropriate here to notice sundry conveyances offered by defendant on the trial of the general issue. Between 1789 and 1798 William Thornton Alexander (under whom defendant claims) conveyed, with reservation of annual rents in perpetuity, several lots in the neighborhood of Franklin Street, by descriptions of which the following is a type:

> Beginning upon the north side of Franklin St. 205 ft. to the eastward of the east line of Union Street and extending from thence eastwardly with Franklin Street *into the River Potomac*, and *returning* from thence again *to the place of beginning*, and running thence northwardly with a line parallel to Union Street 93 ft., 3½ in., thence eastwardly with a line parallel to Franklin St., *into the River Potomack;* thence with a line parallel to Union

> St., southwardly till it intersects the line of Franklin St., and all houses, buildings, streets, lanes, etc. (R. 122–3.)

Note that the side lines are described as running from fixed points on fast land *into the river*, but no distance or terminus is stated. The river line which is to connect these side lines has no defined position. Defendant's theory is that this amounts to a claim of ownership in the bed of the river *ex adverso* the Virginia shore as far as an ideal straight line extending from headland to headland, i. e., from Jones Point to Point Lumley, or to some other point. But there is no evidence of any possession corresponding to that. Nor is there any evidence that such ideal line would be "parallel to Union Street." The deed, moreover, does not bear any such construction. To run a boundary line *into* the river without specifying any distance is no more than to run it *to* the river. The physical object mentioned, the river, necessarily constitutes the call, and the next line runs with the river.

This view is corroborated by the fact that, when Alexander in 1806 conveyed the reversion and rents in the same lots, he bounded his entire tenement as follows:

> "Beginning at the intersection of Fayette and King Streets, thence along Fayette Street to Hunting Creek, thence down the several meanders of Hunting Creek to the River Potomac, thence *down the several meanders of the said river* to King Street, and thence up King Street to the beginning." (R., 125.)

The language used in the previous ground-rent conveyances seems to have been adopted with a view to the use of the shore as a wharf. This is borne out by the subsequent conveyances.

In asserting its ownership and jurisdiction of the river bed, on which the land in dispute has been raised, the United States permits full effect to be given to any actual possession under these conveyances. Whatever land has been made, and whatever wharves have been constructed, by virtue of these deeds, remain undisturbed. A large part, if not the whole, of defendant's so-called upland is land thus made. [Compare the 1845 line and the 1910 line shown on Ex. B.] But no further possession or occupation is shown. That, we submit, is a complete answer, even if defendant's contention were correct. Running imaginary lines into a stream *is not a mode of taking possession* of the bed and soil of a public navigable river.

II. NO ACQUIESCENCE IN THE SUBSTITUTION OF A STRAIGHT-LINE BOUNDARY.

We pass to the question of the supposed acquiescence by the United States, and its predecessors in title, in a boundary claimed to run in straight lines drawn from point to point at low-water mark.

Manifestly this is a different question. It applies not merely to the *locus*, but to the whole stretch of the river from Chain Bridge to Jones Point. This contention is altogether modern and dates only from the period of the arbitration of 1878. When, in 1776, Virginia made her first public statement of her claim,

she spoke only of shores or strands and improvements made, or which shall be made thereon. (R. 14.) As already shown, this claim was at once repudiated by Maryland. (R. 15.)

Nor does the compact of 1785 give evidence of any such pretension. It provides that the citizens shall have full property in the *shores adjoining their lands.* Nothing is said about a headland line or bays, coves, or other indentations. Even as to the shores, defendant is mistaken in construing the compact as a recognition of a preexisting right. On the contrary, its language is *prospective* and its operation *contractual.* "The citizens shall have, etc." And, as the Court of Appeals said, it was a contract never operative as to the District.

We have already discussed the statutes relied on as showing a claim of jurisdiction by Alexandria over a portion of the river, and as well the statutes which show, on the other hand, that the United States has continually claimed the entire river in its course through the District in the same manner as the Proprietary had insisted that "the whole river Potomack is within the limits of Maryland as described in the royal charter." (R. 13.) Nor does there seem to be any occasion for repeating the discussion as to the effect of the filling done along the city front, principally in the eighteenth century between Point West and Point Lumley (Duke Street). All of the land so made is left untouched by this suit. Full effect may be given to such encroachments as accomplished facts, but they can not

impair the Federal right to control the improvement of the river, nor are they evidence of acquiescence in a general right to make such fills between any other chosen points.

We come now to the actual exercise of jurisdiction over *the river and its submerged soil.*

There are three ways in which one would naturally expect to find such jurisdiction exercised: (1) By police of the waters and protection of the fisheries. (2) By taxation of physical objects affixed to the soil of the river bed. (3) By the execution of legal process. Under each of these heads there would seem to be evidence sufficient to dispose of the theory of acquiescence.

(1) Under the first head, it is necessary only to invite the court's attention to the statutes enacted by Congress for the protection of the waters of the Potomac (R. 29–31), and to the series of fishery cases summarized in the record, pages 86 to 89, in one of which (R. 89) the jurisdiction exercised to high-water mark was contested before the Court of Appeals. Compare the Maryland act of June 22, 1768. (R. 14.) Defendant seeks to offset this by evidence that refuse from the Alexandria gas works and a fertilizer and chemical plant there has been emptied without objection into the river. (R. 85.) But we show that in both cases the waste referred to is not deleterious to fish or otherwise. (R. 90.) All this is but an instance of that innocent use of waters which the owner of a boundary river would not think of denying to the opposite State. But what

defendant has undertaken to prove is continued acquiescence in an exclusive *territorial* jurisdiction altering the charter line.

(2) In respect of jurisdiction over fixed objects, we have the history of the Long Bridge and the Acqueduct Bridge. (R. 21–28.) Defendant seems to think (brief, p. 48) that this evidence is met by saying that, independently of cession from either State, Congress, under the commerce clause, would have power to *authorize* the construction of bridges across a navigable stream. True. But that would not give it power to deal with the matter of the structure's territorial *situs*. When the Acqueduct Bridge *up to high-water mark* on the Virginia side was taxed by the authorities of the District, and the assessment judicially sustained (R. 27), that was an exercise of territorial dominion and sovereignty up to the line stated. (*Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 613.)

(3) With respect to the execution of process and the general exercise of police power, we have the significant fact that the District of Columbia does, while the city of Alexandria does not, maintain a boat or vessel for harbor police on the Potomac, and we find that persons accused of crime, arrested on request by the Alexandria police on the docking there of a boat coming from Washington, have been turned over to our harbor police without extradition or removal proceedings. (R. 91.) It may be noted also that bars on the ferry boats, while in the ferry slip at Alexandria, have been kept closed

in obedience to the excise laws of the District. (R. 89.)

Considering that defendant has the burden of proving a total alteration in an established legal boundary, it would seem that its evidence is quite insufficient. The boundaries of States are not lightly altered. Defendant has shown neither actual adverse occupation of the *locus in quo*, nor acquiescence by word or deed in a claim to draw a boundary different from that established by the charter.

It is submitted that defendant failed to maintain its plea to the jurisdiction. We pass next to a consideration of the questions arising under the general issue plea.

Part Two.

THE QUESTION OF TITLE.

The *locus* having been shown to be within the limits of the District, the Government's title to it would seem to follow as a necessary consequence. Since the dominion and jurisdiction of the United States extend to high-water mark on the Virginia shore of the river, so must its ownership of the soil under the river. For the rights are coextensive and depend upon the same title. From this it follows that:

TENTH POINT.

The United States, being owner of the soil of the river, remains owner of the land lawfully reclaimed upon it.

The title of the lord proprietary, which has here devolved upon the United States as the exclusive

territorial sovereign of the District, is, like the title of the Crown in tidal rivers in England, an absolute right of property in the soil up to high-water mark. It includes the *jus privatum* as well as the *jus regium;* ownership as well as dominion and jurisdiction. In other words, the United States is seized as of fee, in right of its sovereignty, of and in the bed and shores of the Potomac River to the ordinary high-water mark on each shore thereof.

Morris v. *United States*, 174 U. S. 196, 227.
Cropley v. *District*, 23 App. D. C. 232, 244.
Shively v. *Bowlby*, 152 U. S. 1, 11.
Hale, *de Jure Maris*, c. VI.

It follows of necessity, upon a principle implicitly conceded by the defendant, that the United States, being the owner of the fee of the submerged soil, remains the owner of the fee of the soil reclaimed.

Barney v. *Keokuk*, 94 U. S. 324.
Haight v. *City of Keokuk*, 4 Iowa, 199.
Tomlin v. *Dubuque R. R. Co.*, 32 Iowa, 106.
Hoboken v. *Penn. Rd.*, 124 U. S. 656.
Stevens v. *Paterson & N. R. R. Co.*, 34 N. J. L. 532.
Sage v. *Mayor*, 154 N. Y. 61; 47 N. E. 1896.
Home, etc., v. *Commonwealth*, 202 Mass. 422; 89 N. E. 124.

The soil while submerged, like the waters flowing over it, was subject, of course, to the *jus publicum*, the public uses of navigation and fishery. But the protection of these public and common interests was also vested in the United States, which was the

sole judge of the manner in which the river and the soil thereof should be utilized for the promotion of commerce and navigation.

Greenleaf-Johnson L. Co. v. *Garrison*, 237 U. S. 251, 261.

United States v. *Chandler Dunbar Co.* 229 U. S. 53, 62.

As part of the improvement authorized by Congress, the area between the wall and the high-water line has been raised above the tide level and whatever navigation, if any, was ever possible in that portion of the river has been excluded in the interest of better navigation in the channel. (*South Carolina* v. *Georgia*, 93 U. S. 4, 11–17; *Scranton* v. *Wheeler*, 179 U. S. 141, 164.) But that circumstance did not operate to withdraw the area thus utilized from the paramount and exclusive control of the Government or to divest its absolute property in the soil.

Home v. *Commonwealth*, 202 Mass. 422, 429.

Sage v. *Mayor*, 154 N. Y. 61, 79.

Cobb v. *Lincoln Park Com.*, 202 Ill. 427.

Com. Lincoln Park v. *Fahrny*, 280 Ill. 256, 257.

Since the reclaimed area was lawfully raised upon the Government-owned bed and shore of the river within the territorial limits of the District, it can not be distinguished, in point of title and ownership, from the reclaimed flats of the Potomac, which, under the new name of Potomac Park, we have immediately before our eyes. (*Morris* v. *United States*, 174 U. S. 196, 227.)

ELEVENTH POINT.

The grants under which defendant claims the adjacent upland in Virginia carried no title or estate in the locus which, at their respective dates, was the bed of a navigable river in Maryland.

This proposition seems self-evident. Yet the defendant, notwithstanding the judgment on the jurisdiction plea that the land in question is in the District for the very reason that it was part of Maryland, sought, on the trial of the general issue, to deraign title to it under the same grants by which it claims the Virginia upland.

Defendant's upland title rests upon a grant made October 21, 1669, by the governor of Virginia, to Robert Howsing (R. 113), as confirmed by the Virginia act of 1748 (6 Hen. St. c. 55), in pursuance of Fairfax's consent that lands previously granted in the Northern Neck should be confirmed to the grantees, but were to be thenceforth held of him. (R. 114.)

(*a*) The reasons why the Howsing grant can not be a source of title to land in the river have already been given in the Second Point.

(*b*) The second source of defendant's title to its upland is the grant of the Northern Neck of Virginia made by James II to Thomas, Lord Culpeper, and afterwards vested in Lord Fairfax. (R. 114, par. c.)

It is the settled law of this jurisdiction, however, that the previous grant of the river to Lord Baltimore was not affected by the subsequent grant to Lord Culpeper. (*Morris* v. *United States*, 174 U. S. 196, 225.)

The Howsing grant and the Culpeper patent are the only sources of defendant's title. Though previously admitted on the question as to change of boundary, the court below was right in excluding them (R. 159, 161), so far as offered to show title to the *locus in quo;* and their exclusion necessarily required the exclusion of the Virginia act of 1748 (6 Hen. Stat., ch. 55, p. 198), offered to show that the Howsing grant, although within the Northern Neck previously patented to Hopton, had been validated by attornment to his successor, Lord Fairfax. (R. 160.) All that was too late to affect the established title under the Maryland charter.

With the fall of the Howsing grant and the Culpeper or Fairfax patent, fell, of necessity, all of the subsequent conveyances under which defendant traced back its upland title to those sources. However effectual in respect of the upland, they were one and all without effect so far as the *locus* is concerned, for the obvious reason that each of the successive grantors was a stranger to the title already vested in the Maryland proprietary, and therefore had nothing in the premises. (R. 163.)

Defendant complains of the ruling on these private conveyances on the ground that they might be considered in connection with its contention respecting change of boundary by long-continued possession under Virginia with the acquiescence of the opposite sovereign; but they were not offered on that issue. They were offered only after this area had been determined, on the jurisdiction plea, to be in the district,

and they were offered strictly to deraign a private title.

The trial was not before a jury, and all that defendant offered is spread at large on the record. The substantial inquiry is whether it is effectual to show title to this land as land in the District. Plainly, when fully considered, it is not effectual, for the grantors had no legal title, and title by adverse possession can not be acquired against the United States in respect of property held for the benefit of the public. Moreover, defendant showed no actual possession of the river soil constituting the *locus*.

TWELFTH POINT.

The compact of 1785 was not a grant of land from one of the contracting States to the citizens of the other.

Not succeeding in showing a title superior to that of Maryland, defendant's next effort was to break the chain of the Government's title by showing a prior estate in itself derived from the Maryland title. For this it went again to the compact of 1785.

I.

Defendant's contention seems to be that although the compact left the boundary unchanged, its sixth and seventh paragraphs operated as a grant from Maryland of the soil of the shores in front of the Virginia upland abutting on the river, with the privilege of carrying out wharves and other improvements so as not to obstruct or injure navigation. Defendant evinces some hesitancy in the precise formulation of

this proposition. At one place at least (R. 157) the statement is that there was "vested in the State of Virginia *and* her citizens full property in the shores of the Potomac River adjoining *their* lands." Manifestly, property in the sense claimed by defendant can not be vested both in the State of Virginia and in the individual landowners. The State and her citizens can not both be seized of the same soil. What defendant must mean is that the Virginia owners of the upland were vested by the compact with full property in the shores in front of their lands. For to admit that the compact operated between the States, as such, is to concede its character as an interstate treaty dependent for its existence upon the concurrent will of the two contracting sovereigns, and subject to be extinguished by their consolidation in a single successor. Defendant's proposition, therefore, is that these sections of the compact vested in each individual landowner a perpetual, indefeasible estate in the submerged bed of the river in front of his parcel of upland, although, as determined upon the plea to the jurisdiction, such submerged bed remained within the State of Maryland. In short, that the compact operated as a grant.

This contention is precisely the contrary of what defendant urged on the former plea. It then said that the compact changed the territorial boundary between the two high contracting parties, the States. It now says that the compact operated directly between the State of Maryland and certain

citizens of the other State, granting such individuals perpetual estates in Maryland soil.

This novel construction, moreover, is directly in the teeth of the construction placed upon the compact by this court as long ago as 1838.

It was then expressly held that the compact was made by the two States *in their character as States*, and that "the citizens, as such, individually, were in no just sense the parties to it." (*Mayor* v. *Alex. Canal Co.*, 12 Pet. 91, 96.)

And this court went on to show that as a necessary consequence of the very nature of the instrument—

> The same power which established it was competent either to annul or to modify it. Virginia and Maryland, then, if they had retained the portions of territory respectively belonging to them on the right and left banks of the Potomac, could have so far modified this compact as to have agreed to change any or all of its stipulations. They could, by their joint will, have made any improvement which they chose, either by canals along the margin of the river, or by bridges or aqueducts across it, or in any other manner whatsoever.

Since the compact thus rested solely upon the joint will of the two contracting States and was subject at any and all times to be abrogated by their joint act, how is it possible that it should have irrevocably conferred upon individual citizens of one of them perpetual estates in the soil of

the other? Could not this supposed "vested estate" have been annihilated at any moment by the joint act of the two sovereigns? Manifestly any privilege brought into being by the compact and existing solely by virtue of it could be extinguished by "the same power which established it."

It is impossible, then, to treat the compact, made by and existing only through the joint will of the two sovereign parties, as a grant of vested estates to the individual citizens of one of them. And, as pointed out by this court in the same case, as well as by the Court of Appeals in the *Evans case*, whatever the contracting parties, prior to the adoption of the Constitution and before the cession, could have done by their joint will, the United States, as the successor of both, could do by its sole will. It united in itself all the power over the compact which they had previously possessed in common, in addition to absolute and plenary power over commerce, and could make any utilization or improvement of the bed and margin of the river that seemed advisable.

Such being the case, it seems unnecessary to repeat the argument by which it is shown that the necessary consequence of this substitution of a single sovereign for the two original high contracting parties was to abrogate or dissolve the compact by terminating the *mutuus consensus* on which alone it rested. Hence, no vested or perpetual estate can be grounded upon it.

The utmost that can be said for the effect of the compact is that, so long as it remained in force by the consent of the two contracting States, the privileges described in the sixth and seventh paragraphs constituted an international servitude by convention in favor of Virginia in the territory of Maryland. Such a servitude or easement within the territorial limits of another State has nothing in common with seisin. Title remains unchanged. And this conventional State servitude ceased with the merger of the rights of both parties in their common successor and was not revived, expressly or by necessary implication, in any provision of the act of retrocession. (*Supra*, p. 73.)

II.

Defendant endeavors to escape from this difficulty by saying, "vested in the State in trust for her citizens." This does not mend matters. For this must mean either that the compact is with the State (as we insist) or else that it confers rights upon the citizens of Virginia which the two States could not alter by their joint will, which is to overrule (*Alexandria* v. *Mayor*).

It does not serve defendant's purpose to say that the fee simple is vested in the State, not only because of the fatal concession therein involved, but because the express words of the compact are that the *citizens* of each State, respectively, shall have full property in the shores adjoining *their* lands.

You can not ignore these plain words in order to confer a permanent, indefeasible estate upon another legal person. Nor can you seize upon them, ignoring everything else, in order to turn the compact into a grant, contrary to its essential nature, and in the teeth of binding authority expounding and declaring its effect.

Two points emerge, we think, from the embarrassment in which defendant finds itself.

First, that our conception of the compact serves as a solvent. The instrument is unquestionably a treaty and not a grant. Yet the benefits of the "full property," as therein stated, accrued to *the citizens* of Virginia but only so long as the treaty remains in force. The property is a servitude in Maryland soil, derogating to that extent from Maryland's continued ownership and sovereignty. It must therefore suffer the consequences of a servitude when the two sovereignties merged in one.

The second point made clear by defendant's difficulty in formulating its proposition is that its present contention about estates having vested in perpetuity involves, of necessity, a return to its former contention that the compact changed the boundary, and is, in truth, but an indirect way of asserting the same thing. Unless the compact changed the interstate territorial boundary, all argument that the fee simple of the river shores passed in perpetuity to Virginia or to certain Virginia landowners must end in confusion.

III.

It may be added that, even if we should concede to the Virginia landowners a perpetual "property in the shores adjoining their lands," such concession would avail the defendant but little. The term "shore" has a precise and settled legal meaning. It means the space between high-water and low-water mark which every day is left bare by the ebb and covered by the flood of the tide. (*Elliott* v. *Stewart*, 15 Oreg., 259; *Shively* v. *Bowlby*, 152 U. S., 1, 11; *Atty. Gen.* v. *Chambers*, 4 De G. M. & G., 206, 208.) The maps in evidence, especially Ex. B, show that only a small portion of the land reclaimed lies between the high and the low water mark. The greater part of it lies riverward of low-water mark and between it and the channel. Property in the shore manifestly would give no title to that.

In order to maintain a claim to the principal portion of the reclaimed area upon its new theory of the compact, the defendant has to go further and construe the words "with the privilege of carrying out wharves and other improvements" as vesting a fee simple estate in all of the submerged soil as far as the channel. And that, too, regardless of the question whether any wharf or improvement had ever been made or the privilege actually exercised. This interpretation, we submit, does manifest violence to the words of the compact and is contrary to the settled rules respecting the legal effect of such a privilege. The privilege of carrying out wharves, even

when conferred by the riparian owner's State in its proper river, is not construed as vesting a fee simple estate, but as conferring a mere license, revocable at any time before exercise. Before the licensee has acted upon it, he has no property right in the submerged soil. On the contrary, the State, owning the title to the submerged lands, has the right to reclaim them or to grant them to a stranger for that purpose.

Stevens v. *Paterson*, etc., 34 N. J. L. 532, 545.

N. Y. L. E. R. Co. v. *Yard*, 43 N. J. L. 632, 636.

N. Y. Zinc. I. Co. v. *Morris Canal Co.*, 44 N. J. Eq. 398.

Hoboken v. *Penn. Rd.*, 124 U. S. 656, 453.

Linthicum v. *Coan*, 64 Md. 439, 453.

Giraud's Lessee v. *Hughes*, 1 G. & J. 249, 265.

Casey's Lessee v. *Inloes*, 1 Gill. 430, 432, 497, 498, 450.

Bowlby v. *Shively*, 22 Oreg. 410, 420–1.

Shively v. *Bowlby*, 152 U. S. 1, 55.

The privilege of carrying out wharves and improvements is not an interest in the soil under the waterway. But should we, for argument's sake, concede that it is, such an interest could have none of the consequences defendant contends for. In the very nature of things, it is subject to the continuing power both of the Federal and of the State government to make such use of tidal navigable waters, and the soil under them, as the general

public interests in their charge may require. (*Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 87.) The grantee of an undoubted interest in soil so situated, is held, even in Virginia, to take the risk of the destruction of his property therein by the State's use of the waterway for some larger public purpose. Thus a statutory lessee of a specified parcel of submerged soil for oyster planting (though the State *guarantee* for 20 years "the absolute right to continue to use and occupy such grounds subject only to the right of fishing in the waters above"), holds that interest subject to the State's continuing power to authorize municipalities to drain city sewage into the waterway in such manner as to ruin the lessee's oyster beds and render the leased grounds useless. (*Darling* v. *Newport News*, 249 U. S. 540, 543.)

From no aspect, then, can defendant show a title to the principal part of the land in suit.

THIRTEENTH POINT.

Defendant had no riparian rights which could preclude the Government from raising the land between the sea wall and high-water mark.

Defendant claims riparian rights which, it says, the filling of Battery Cove will take away, unless it can have the reclaimed land.

There is no magic in the term riparian rights. It is merely a descriptive term for such rights as are enjoyed by the owner of land by reason of its physical location on the *ripa*. Such rights "are

not dependent upon title to the soil over which the river flows, but are incident to ownership upon its banks." (*United States* v. *Chandler-Dunbar Co.*, 229 U. S., 53, 70.)

Since riparian rights do not depend upon, so neither do they imply, any right in the soil under the water. (*Shively* v. *Bowlby*, 152 U. S., 1, 14.) We may concede the defendant everything that is involved in the term without affecting in the slightest degree the question of title which is in issue here.

Riparian rights, moreover, being mere incidents of the existing topographical situation of the land, are necessarily subject to the obligation to suffer the consequences of all lawful alterations in the stream. (*Jackson* v. *United States*, 230 U. S. 1, 21, 23.) Every right in the public waterway enjoyed by reason of ownership of the *ripa*, such as the right of access to navigation from the upland in its natural state or (when permitted by public law) through the aid of some artificial structure, is, of necessity, subordinate to the paramount, permanent, and continuing power of Government to improve the stream and to make such use of its own property as it may deem best for the public good. (*Scranton* v. *Wheeler*, 179 U. S., 141, 169; *Shively* v. *Bowlby*, 152 U. S., 1, 52, 57.)

As pointed out in *Shively* v. *Bowlby*, an express statutory authorization to construct wharves into the stream so far as might be necessary or con-

venient for the accommodation of any vessel that could navigate such stream does not restrict the right of the State owning the submerged soil to sell and convey such land freed from any easement of the upland owner. In truth, that decision, when duly understood, conclusively rules this case, for it deals with the same common-law right of ownership that we have here. It sustained, as against the upland owner, the right of the State to sell and dispose of the shore lands in front of him. If the sovereign can sell such lands to a stranger to be occupied and used, it can surely improve them itself while it retains the title.

In that case the State's right to sell and convey the tidelands was, of course, subject to the paramount right of the Federal Government to protect and control public navigation. That limitation has no application here, for the obvious reason that in this District the National Government has undivided sovereignty. It is in the exercise of its combined powers, which include navigation, that it has constructed this improvement on its own land.

In accord with *Shively* v. *Bowlby*, are the decisions of all the jurisdictions in which, as here, the State has the Crown common-law title to lands under tidal streams.

> *Bowlby* v. *Shively*, 22 Oregon, 410, 414, 418, 426–427.
>
> *Eisenbach* v. *Hatfield*, 2 Wash. St., 236; 36 Pac. Rep., 539.

In the latter case the court, referring to the decisions of this court, particularly *Hoboken* v. *Pennsylvania R. R. Co.* (124 U. S. 656), stated that they—

> * * * would seem to settle beyond controversy the question of title to the tidelands of this State and to leave no doubt whatever that they belong to the State in actual propriety and that the State has full power to dispose of the same, subject to no restrictions save those imposed upon the legislature by the constitution of the State and the Constitution of the United States; and if this be true it necessarily follows that no individual can have any legal right whatever to claim any easement in, or to impose any servitude upon, the tidewaters within the limits of the State without the consent of the legislature (pp. 244, 245).

The conclusion drawn was—

> * * * that riparian proprietors on the shore of the navigable waters of the State have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the State to deal with its own property as it may deem best for the public good. If the State can not exercise its constitutional right to erect wharves and other structures upon its public waters in aid of navigation without the consent of adjoining owners, it is obviously deficient in the powers of self-development which every government is supposed to possess—a proposition to which we can not assent (p. 253).

To the same effect are:

Muir v. *Johnson*, 49 Wash. 66.

North P. R. Co. v. *S. E. Slade & Co.*, 61 Wash. 195.

In New York access is conceded to be a right for the deprivation of which the owner is entitled to damages against one who, in pursuance of a grant from the legislature, erects a structure across his water front. Nevertheless, it is held that this right, however good against strangers, is enjoyed in subordination to the right of the State (and therefore of its grantee, the city, which had the same power as the State) to convert the submerged soil into fast land in the interest of commerce. (*Sage* v. *The Mayor of New York*, 154 N. Y. 61, 76.)

This case is noteworthy in that it affirms the right of the State or its authorized agency, if the public interest requires it, to interpose, by reclamation in front of the original riparian estate, even a new system of docks and bulkheads which the Government may lease to private individuals.

A similar reclamation in front of, and without compensation to, the upland owner was sustained in *Home* v. *Commonwealth*, 202 Mass. 422.

There the work was not done in aid of navigation, but for another public purpose. It was held, however, that the State's inherent right to make use of submerged lands for the public good was not limited to navigation alone. As to the riparian right of access, the court said:

> In a sense, there is a valuable right of access to the waterway or to the street, so

> long as the waterway or street is there. But it does not follow that the abutter on the waterway can insist that the Government shall make no change in the waterway on its own land, in the interest of more convenient and valuable navigation, which shall leave him with a less convenient passageway to the channel, or perhaps with no passageway at all. The Government has this paramount right to do what is necessary for the public good, in promoting better navigation. The benefits enjoyed by the abutting landowner are held subject to the possibility of diminution or loss by the exercise of this right. (*Home, etc.*, v. *Commonwealth*, 202 Mass. 422, 429.)

The true effect of a harbor line.

It seems appropriate at this point to say a word concerning the inferences defendant seeks to draw from the location of the harbor line.

The establishment of a harbor line by the Secretary of War under the act of March 3, 1890 (30 Stat. L. 1151), is a matter of administration. It does not confer any right, title, or interest upon the riparian owner. It is a mere declaration that structures extended to that point will not interfere with navigation. Whether any such structure, or fill, can be made at all upon the river bed is quite another question.

The fixing of the line is not an authority to make a structure without the consent of the owner of the submerged land. Much less is it a grant of authority

to reclaim upon the bed of a navigable stream in a jurisdiction where the legislative power has not distinctly and positively conferred that right.

> It is not a declaration touching the rights of the owners of the submerged lands in the harbor * * *. But such permission is not given to override the rights of the owners of the submerged lands * * *. It is strictly permissive, and not an authorization by paramount authority to build the structure.
>
> *Cobb* v. *Lincoln Park Commissioners*, 202 Ill. 427; 67 N. E. 5, 9.
>
> *Wilson* v. *Hudson C. W. Co.*, 76 N. J. Eq. 543.
>
> *Hubbard* v. *Fort*, 188 Fed. 987, 994, 996, 997.
>
> *Bradshaw* v. *Duluth I. M. Co.*, 52 Minn., 49.

It suffices to say that with us there is no local law conferring power to fill, and the appellant did not fill.

The correctness of this view becomes even more manifest when we consider that the power is a permanent and continuing power, never exhausted by the exercise of it. (*Greenleaf-Johnson L. Co.* v. *Garrison*, 237 U. S. 251.) If the Secretary may, as in that case, alter the existing line and cause everything beyond it to be removed without compensation, manifestly, the mere fixing of the line could not have operated to pass any title or interest to the area defined by the line. Much less could it pass any title or interest to such area before anything was erected out to the line.

And as the general power to make and alter the improvement is equally permanent and continuing,

it is quite clear also that the United States, which has here improved the Potomac River with a dike and fill confining the channel, may hereafter remove that dike and dredge the river to the width of its natural bed. The power of Congress over this natural highway is coexistensive with the stream and remains uncurtailed until Congress itself sees fit, by positive action, to grant away, as no longer serving any public purpose, what portion of the former bed may seem advisable.

FOURTEENTH POINT.

Conceding, argumenti gratia, that defendant had riparian rights which were cut off by the reclamation, that would not invest it with title to the reclaimed area.

The issue here is ownership. What defendant sought to do was to displace the *prima facie* title of the Government as owner of the river bed and maker of the improvement by showing a fee simple title in itself. Whence, then, is that title derived?

Defendant had no title to the land when it was under water. The land reclaimed is not an accretion to defendant's upland made, little by little, by the gradual and imperceptible natural action of the water. (*Jefferis* v. *East Omaha L. Co.*, 134 U. S. 178, 192; *Linthicum* v. *Coan*, 64 Md. 439, 450.) Defendant is unable to show a valid grant of it from any one of the successive owners of the title.

Defendant's case on this point resolved itself, then, into the proposition that it acquired title to this tract because, in reclaiming it, the United States committed a tort. (R. 157.)

Should we concede that defendant had a right of access to the water and that the United States injuriously cut off that access, how would that vest in defendant a title to the land made by the United States on its own soil?

Or, should we go so far as to concede that this right of access was itself a species of property, an incorporeal hereditament, and that the reclamation has taken that property from defendant, how can the taking of that property vest in defendant title to another and different property—a separate reclaimed area?

Surely no argument is needed to show that the United States would not, by impairing or by destroying the access to defendant's property, divest itself of its own title to another property and transfer it to defendant.

In fact, it has been decided that submerged land, the title to which is in the State, *but actually reclaimed by a stranger*, does not become the property of the riparian owner whose access is thereby taken away to his damage.

In *Austin* v. *The Rutland Railroad Co.* (45 Vt. 215) the riparian owner's estate extended "to the utmost limit of title and ownership in the soil known to the law," viz, to low-water mark. He had, moreover, a statutory right to erect a wharf or storehouse and extend the same from his land to the channel of the lake. Nevertheless, it was held that he acquired no title whatever to land made by a stranger by filling in earth in front of

his land from low-water mark into the lake and upon which such stranger had built wharves and docks. It was said:

> As the absolute owner of said lot, he had the exclusive right to use it in passing to and from the lake. But this gave him no peculiar or additional right as to the lake itself. Of course, it could not give him title to erections or structures made by others beyond the limits of his own land. If, in making such erections and structures, others should violate any right of his, as owner of the land to low-water mark, he could seek redress in some proper way, but not by action based on his right as the owner of them. (*Austin* v. *The Rutland R. R. Co.*, 45 Vt. 215, 242, 244.)

The whole question is one of title. Work done on the *abutting* land does not become a part of the riparian owner's land.

> * * * Here was no building *upon* the plaintiff's land, only an abutting against it by a structure made outside of it. It is not a case of accretion or gradual reliction, which belongs to the riparian owner. It does not fall within the right *usque ad coelum*, for that, of itself, does not often extend more widely than the *solum* of the owner, on which such right must be grounded. * * * (*Austin* v. *The Rutland R. R. Co.*, 45 Vt. 215, 244, 245.)

The same principle is applied in *Coburn* v. *Ames*, 52 Cal. 385, which was an action of ejectment for six acres of land lying on the shore of the Pacific Ocean and for a wharf and chute projecting from

the mainland out to deep water—a considerable distance below low-water mark. The plaintiff was the uncontested owner in possession of the land above high-water mark. The court assumed that, as riparian owner, he was entitled to wharf out to deep water and, also, that the wharf and chute in front of him were erected wholly without authority (p. 397). The plaintiff contended that the wharf and chute became his property. The court said:

> * * * On the contrary, giving to this right of the riparian owner its widest scope and latitude, it amounts only to this: That if he desires to wharf out, and is unlawfully obstructed in the exercise of the right, he may maintain an action for damages; and if the obstruction amounts to a public nuisance, it may be abated by appropriate proceedings for that purpose. If it be only a private nuisance which obstructs him in the exercise of his right to wharf out, he may possibly cause it to be abated by the appropriate method. But he has no such title or right to the possession of the bed of the ocean as will enable him to maintain ejectment. (*Coburn* v. *Ames*, 52 Cal. 385, 398.)

If, as these cases show, the riparian owner acquires no title to land reclaimed in front of him by a stranger, much less can he have any title to land reclaimed in front of him by the sovereign upon its own soil. All of the cases really proceed upon one principle, viz, that he who owns the submerged land owns the land reclaimed. *Sciendum est eius manere cuius fuit.* The riparian owner only gets the land

reclaimed when he is also the owner of the fee in the submerged land or has, by valid grant, an interest therein amounting to such ownership. To defeat this action, therefore, defendant must show a title to the land when submerged. This, by the law, it can not do. An injury to rights which exist independent of the title to the land submerged, and as incidental merely to its upland (which remains untouched), will not avail, no matter how serious or far-reaching such injury might be.

In fact, defendant's contention would lead to the absurd consequence that the less its riparian rights were worth the more it would receive in consequence of their being taken away. The greater the stretch of shoal water in front of its upland the greater, of necessity, the extent of reclamation. But the greater this stretch of shoal water the less the value of the riparian rights.

Conceive two riparian owners having tracts of equal frontage, one only 100 feet from the channel the other separated from it by 500 feet of shoal water. The cutting off of riparian rights by a wall along the channel injures the first vastly more than the second, yet the second, upon defendant's theory, would acquire a reclaimed area five times greater than the first.

The case taken as an illustration is no more striking than the case at bar.

All the maps in evidence concur in showing that the bow-shaped indentation called Battery Cove had an average depth of 1½ feet at low tide. (R. 6.)

Only at the northern and southern extremities of the arc did the shore approach the navigable channel. Hence, only a small fraction of the reclaimed area would fall to the owners of the upland parcels at these extremities, where there was little if any reclamation; whereas a large area would devolve upon the owners of the parcels in the center, where, by reason of distance from the channel, reclamation was necessarily extensive. **Thus, if defendant is right, the shore where the riparian rights are the least valuable would acquire the major portion of the reclamation.**

According to the proposition now under consideration, title to the reclaimed area results solely from riparian rights. If so, the land which the riparian owner gains is in *inverse ratio* to the value of the riparian rights which reclamation has taken away.

Obviously title to the land reclaimed is not the measure of compensation for the cutting off of riparian rights. Ownership must, in accordance with fundamental principles, be left to follow the title of the *solum*. Any injury to riparian rights, **however great, is not a grant of the soil.**

It is respectfully submitted that the judgment should be affirmed.

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Appendix.

Notes on Certain Maps.

Exhibit 3: This is a composite map designed to show Jones Point, Lumley Point, and Point West.

This is not an original map, but a composite, made by pasting two distinct blue prints together The first would appear to be a map of the Alexandria water front prior to the reclamation. The second is an unauthenticated blue print, which shows the sea wall as proposed and upon which also has been laid down Point Lumley as it appears by Exhibit 1 to have been in 1748. It is obvious that this composite map has no probative force whatever. It does not represent conditions at any one time according to any actual survey.

Exhibit 5: This is also a composite map. It is a copy of Exh. 4 (plat attached to House Doc. No. 1253, 60 Cong., 2 sess.), on which plaintiff in error (defendant) has attempted to lay down (1) retaining wall built by the Government and (2) the shore line in 1748.

This map shows that the old marks of Point Lumley are destroyed, and that the present shore line in that vicinity is altogether artificial. In this map defendant has, also, indicated the bulkhead line proposed by the engineers, and has drawn a straight line from the artificially extended Point Lumley to Jones Point for the purpose of indicating that the reclaimed area is westward of such imaginary line. See *Supra*, Seventh Point (iii).

Exhibit 11: Plat showing properties in the neighborhood of the shipyard at the foot of Franklin Street.

This plat, prepared by defendant's counsel, does not show on what survey, if any, it is based, but

counsel for plaintiff understands that it was prepared for the purpose of illustrating the titles to the different lots in the vicinity of the shipyard.

Upon this map lines have been drawn which would show where Union, Green, Church, and South Streets *would run if extended* into the river between Jones's Pt. and the shipyard. But it obviously has no probative force. It is singular, also, in putting the water line farther inland into Lee Street than the Maskell Ewing map of 1845.

Exhibit 12: Sketch of the squares and lots showing the relation of Strand Street to Point Lumley.

This plat, prepared by defendant's counsel to illustrate an abstract of title, is wholly outside the locus. It shows the original lines and divisions of the squares between Wolf St. on the south and Duke on the north and eastward of Union St. It shows that Strand St. was laid out between Duke and Wolf Streets, parallel with and at a distance of 180 feet from Union; but a comparison of this map with the original plat of the city, Exh. 1, will show that this Strand Street was laid out on fast land existing as early as 1748. The evidential value of the map, therefore, is not apparent. We have always conceded that the area between Pt. Lumley and Pt. West was filled in, in the XVIII century, to the extent of about a square and a half; i. e., from Water (now Lee) Street to the present shore line east of Strand Street.

Exhibit 13 is purely illustrative. On a photographic copy of a portion of Exh. 6 defendant has drawn in the water a straight line from Jones's Point to the river bank between Pendleton and Wythe Sts. for the purpose of illustrating his contention that the boundary is an imaginary straight line.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

NO. 326.

MARINE RAILWAY AND COAL CO., INC.,

PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA,

DEFENDANT IN ERROR.

In Error to the Court of Appeals of the District of Columbia.

REPLY BRIEF OF PLAINTIFF IN ERROR ON

MOTION TO DISMISS.

In its reply brief upon the hearing, the Defendant in Error questions the right of this Court, to entertain the Writ of Error in this case, and suggests that it be dismissed, because the order allowing the Writ does not specifically show, that the question of jurisdiction alone is certified to this Court for decision.

It is submitted, that this motion should not be sustained for the reasons following:

FIRST:

1. The Defendant in Error admits that the jurisdiction of the trial Court is the sole question before this Court for its decision, in these words: "This case turns upon the location of the boundary between Virginia and the District of Columbia, on the Potomac River;" and, devotes the first sixteen pages of its brief to the boundary question between the District of Columbia and Virginia, and the question of the jurisdiction of the trial Court.

2. The petition for the Writ of Error, is in strict compliance with the provisions of Section 250 Judicial Code, and the first and sixth paragraphs thereof, and is based upon the following questions:

(a) The jurisdiction of the trial Court.

(b) The construction of certain Federal Statutes, drawn in question by the Defendant on the trial of the plea to the jurisdiction, in their relation to the territorial boundary between the District of Columbia and Virginia.

(c) The construction of paragraphs six and seven of the Compact of 1785, in their relation to the boundary between Virginia and Maryland, and to the boundary between the District of Columbia and Virginia.

(d) The jurisdiction of the trial Court in this case, is wholly dependent upon the location of the territorial boundary between the District of Columbia and Virginia, and is inseparable from it and must be determined by it.

3. None of the statutes, the construction of which are involved in this controversy, are local in the sense in which the counsel for the Defendant in Error contends. They do not relate to the internal affairs of the District of Columbia.

(a) The Act of Congress receding Alexandria City and County to the State of Virginia, is not local in its character. It is an Act in which both the United States and the State of Virginia were interested.

(b) The Act of Congress, approved June 22, 1874, Section 1, territorial area, is likewise not strictly local, but effects not only the District of Columbia, but also, both the states of Maryland and Virginia, as the two latter are interested in where that boundary line is located.

(c) The Act of Congress approved March 3, 1879, giving consent to the agreement, arbitration and award of Virginia and Maryland, is not local in its character. In its bearing, it not only has relation to the territorial boundaries of the District of Columbia, but has relation also, to the states of Maryland and Virginia, and the boundary line between them, in which all three jurisdictions have an interest.

4. The petition for a Writ of Error to this Court, pages 203 to 205 inclusive, of the printed record, shows clearly the grounds upon which the petition is based, and from which it distinctly appears, that it is based upon the question of the jurisdiction of the trial Court, and the construction of certain laws of the United States in their relation to and effect upon the territorial boundary line between the District of Columbia and the State of Virginia, and the construction of paragraphs six and seven of the Compact of 1785, between Virginia and Maryland, in their relation to the boundary between said States, and to the boundary between Virginia and the District of Columbia. Upon this petition, as will appear from pages 209 to 210, inclusive, of the printed record, the Writ of Error was allowed to this Court. From the petition for the Writ of Error, and the order allowing the same, there is but one conclusion to be drawn, that is, the only question presented to this Court for decision, is the jurisdiction of the trial Court, which necessarily involves the determination of the boundary line between the District of Columbia and Virginia. All the errors assigned relate to the question of jurisdiction, and as a necessary incident thereto, the boundary line between the District of Columbia and Virginia. The plea filed by the Plaintiff in Error in the trial Court, is to the territorial jurisdiction of the trial Court, and nothing else. Surely, it will not be contended in such a case, it is necessary to put in the order granting the petition, a certificate that the only question certified to this Court for its decision, is the jurisdiction of the trial Court, when from the petition and the record, it sufficiently appears, that the only questions submitted by the petition for the Writ of Error, is that of the jurisdiction of the trial Court, and the construction of the Statutes and Compact mentioned as bearing upon that question.

It is therefore respectfully submitted that the question of the jurisdiction of the trial Court, is sufficiently certified to this Court for decision, and agrees with the rule laid down by this Court in the following cases:

Interior Construction & Improvement Co. vs. John C. Gibney, et al, 160 U. S. 217-220.

Huntington vs. Laidley, 176 U. S. 668.

SECOND:

As to the further contention of the Defendant in Error, that this Court is without jurisdiction to entertain this Writ of Error, because the issue in this case on the plea to the jurisdiction of the trial Court did not involve the jurisdiction of the trial Court as an United States District or Federal Court, but the jurisdiction only of said Court under its fundamental power as a local Court of general jurisdiction to entertain any action touching the locus. It is respectfully submitted that this contention of the Defendant in Error, is without merit, for the following reasons:

1. This case was not instituted by the Defendant in Error, in the Supreme Court of the District of Columbia, sitting as an United States District Court, and does not fall within the line of cases included within the qualified and limited jurisdiction of the Federal Courts. But, on the contrary, it was instituted in said Court as a local Court of general jurisdiction in law and equity, and under claim that it had jurisdiction of the subject matter thereof. The judgment in this case was obtained in said Court under its last mentioned jurisdiction, from which it was appealed to the Court of Appeals of the District of Columbia and affirmed. This case could not have been brought in the Supreme Court of the District of Columbia, sitting as an United States District Court, as its jurisdiction is defined by Congress in Section 24, Chapter 2, of the Judicial Code.

2. The Supreme Court of the District of Columbia, is vested by the Acts of Congress relating to the Courts of the District of Columbia, with dual jurisdictions: First—Jurisdiction as an United States District Court, and Second

—With general jurisdiction as a local Court in law and in equity. These jurisdictions as conferred by statutes are wholly distinct one from the other, and are exercised by said Court in its dual capacity. In the first instance, while sitting as an United States District Court for the District of Columbia, it has jurisdiction in law and in equity, yet, that jurisdiction is a qualified one, and is limited to the class of cases specifically defined by Chapter 2, Section 24, of the Judicial Code. In the second instance, its jurisdiction in law and in equity, is general and unlimited as a local Court, in all cases touching the locus. This distinction was made and has been preserved in the Acts of Congress relating to the jurisdiction of the Courts of the District of Columbia from the organization of its Courts.

3. A brief review of the history of legislation by Congress, relating to the jurisdiction of the Courts of the District of Columbia, will show that the distinction between its general jurisdiction in law and equity as a local Court, and its jurisdiction as a Federal Court, has been consistently maintained from the very beginning, and will show also, that the instant case is not within the jurisdiction of the Supreme Court of the District of Columbia sitting as a Federal Court, but is strictly within the jurisdiction of said Court as a local Court of general jurisdiction in law and equity.

The Act of Congress of 1802 for the organization of the Courts of the District of Columbia, United States Statutes at Large, Vol. 2, Chapter 15, Section 3, page 105, provides:

"That there shall be a Court in said District which shall be called the Circuit Court of the District of Columbia; and the said Court and the judges thereof shall have all the powers by law vested in the Circuit Courts, and the judges of the Circuit Courts of the United States."

The same Act, Section 5, page 106, provides:

"That said Court shall have cognizance of all crimes and offenses committed within said district, and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district, and also, of all actions or suits of a civil nature at common law or in

equity; in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States."

The same Act, Section 8, page 106 provides:

"That *any* final judgment, order or decree in said Circuit Court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States, by Writ of Error, or Appeal, and which shall be prosecuted in the same manner, under the same regulations; and the same proceedings shall be had therein, as is or shall be provided in the case of Writs of Error or judgments, or appeals upon orders or decrees, rendered in the Circuit Court of the United States."

The Act of Congress of 1863, providing for the organizations of the Supreme Court of the District of Columbia, United States Statutes at Large, Vol 12, Chapter 2, Section 3, page 763, provides:

"That the Supreme Court organized by this act, shall possess the same powers and exercise the same jurisdiction as is now possessed and exercised by the Circuit Court of the District of Columbia, and the justices of the Court so to be organized, shall severally possess the powers and exercise the jurisdiction now possessed and exercised by the judges of said Circuit Court. Any one of said justices may hold a District Court of the United States for the District of Columbia, in the same manner and with the same powers and jurisdiction possessed and exercised by other District Courts of the United States. Any one of said justices may also hold a criminal Court for the trial of all crimes and offenses arising within said district, which Court shall possess the same powers and exercise the same jurisdiction now possessed and exercised by the Criminal Court of the District of Columbia."

The same Act, Section 11, page 764, provides:

"That *any* final judgment, order, or decree of said Court, may be re-examined and reversed, or affirmed, in the Supreme Court of the United States, upon Writ of Error or Appeal, in the same cases and in like manner as is now provided by law in reference to the final judgments, orders and

decrees of the Circuit Court of the United States for the District of Columbia."

Chapter 3, Section 563, page 94, of the Revised Statutes of the United States, Second Edition, clearly defines the jurisdiction of the District Courts of the United States as then existing, and a careful examination of this section clearly shows that, its jurisdiction is wholly Federal in its character and relates to matters peculiarly within the province of the Federal Courts, and does not relate to the general jurisdiction which is vested in the local Courts of law and equity of the States and Territories of the United States, or of the District of Columbia.

Chapter 11, Section 705, page 132, provides for Writs of Error or Appeal from *any* judgment or decree of the Supreme Court of the District of Columbia, to the Supreme Court of the United States, in any case where the matter in dispute exclusive of costs exceeds the value of $1,000.00, etc.

The Supplement to the Revised Statutes of the United States, Vol. 1, Second Edition, 1874 to 1891, page 130, chapter 69, paragraph 11, defines the jurisdiction of the Supreme Court of the District of Columbia, to be as follows: Of all crimes and offenses committed within said district, and of all cases in law and equity between parties, both or either of whom shall be resident, or be found within said District, and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land and water and all penalties and forfeitures made, arising or accruing under the laws of the United States, etc. (Chap. 35, Sec. 22, Compiled Statutes of U. S. in force in the District of Columbia, 1894) contains the same provision.

Chap. 355, page 485, defines the jurisdiction of appeal and Writ of Error from judgments or decrees of the Supreme Court of the District of Columbia in suits at law or in equity to be limited to cases in which the amount involved exceeds the sum of $5,000.00, exclusive of costs.

Section 61 of the District Code, Torbert Edition, Annotated, 1919, defines the jurisdiction of the Supreme Court of the District of Columbia as follows: The said Court shall possess the same powers and exercise the same juris-

diction as the Circuit and District Courts of the United States, and shall be deemed a Court of the United States, and shall also have and exercise all the jurisdiction possessed and exercised by the Supreme Court of the District of Columbia, under the Act of Congress approved March 3, 1863, creating that Court, and at the date of the passage of this Code.

Section 64 provides, "the special term of said Court shall be known, respectively, as the Circuit Court, the Equity Court, the Criminal Court, the Probate Court and the District Court of the United States."

Section 226 provides that any party aggrieved by any final order, judgment or decree of the Supreme Court of the District of Columbia or of any justice thereof, including any final order or judgment in any case heard on appeal from a Justice of the Peace, may appeal therefrom to the said Court of Appeals and upon such appeal the Court of Appeals shall review such order, judgment or decree and affirm, reverse or modify the same as shall be just, etc.

Section 233 provides *any* final judgment or decree of the Court of Appeals, may be re-examined and affirmed, reversed or modified by the Supreme Court of the United States, upon Writ of Error or appeal in all cases in which the matter in dispute exclusive of costs shall exceed the sum of $5,000.00, in the same manner and under the same regulations as existed in cases of writs of error or judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February 9, 1893, and also, in cases without regard to the sum or value of the matter in dispute wherein is involved the validity of any patent or copyright or in which is drawn in question the validity of a treaty of or authority exercised under the United States.

Section 238 of the Judicial Code provides, that appeals and writs of error may be taken from the District Courts including the United States District for Hawaii direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision, etc.

Section 250, Paragraph 1, provides, that *any* final judg-

ment or decree of the Court of Appeals of the District of Columbia, may be re-examined and affirmed, etc., by the Supreme Court of the United States upon Writ of Error or Appeal, in the following cases: 1—In cases in which the jurisdiction of the *trial* Court is in issue. 6—In cases in which the construction of any law of the United States is drawn in question by the defendant, etc.

From this review of the Statutes, it is clear that the distinction between the respective jurisdictions of the Supreme Court of the District of Columbia as a Court of general jurisdiction in law and equity, and as an United States District Court, has been consistently maintained; and it is also clear that the Writ of Error and Appeal from these separate jurisdicions have been in the past, and are now, separate and distinct as is shown by Sections 238 and 250 of the Judicial Code, and the preceding legislation relating thereto. To contend otherwise, is to say, that Congress has been engaged in idle and unnecessary duplication of the Statute Law on these questions.

It is therefore respectfully submitted, that this Court clearly has jurisdiction to review this case under Section 250 of the Judicial Code, and that the Writ of Error was properly allowed, and that the motion to dismiss should be overruled.

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